TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 111.

THE UNITED STATES *EX REL.* EMILY E. PARISH, EXECUTRIX OF JOSEPH W. PARISH, DECEASED, PLAINTIFF IN ERROR,

vs.

GEORGE BRUCE CORTELYOU, SECRETARY OF THE UNITED STATES TREASURY.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JUNE 21, 1907.

(20,768.)

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In the Court of Appeals of the District of Columbia.

No. 1771.

THE UNITED STATES *ex Rel.* EMILY E. PARISH, Executrix, &c., Appellant,
vs.
GEORGE BRUCE CORTELYOU, Secretary of the United States Treasury.

a Supreme Court of the District of Columbia.

At Law. No. 48507.

THE UNITED STATES *ex Rel.* EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased,
v.
LESLIE M. SHAW, Secretary of the United States Treasury.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Petition.*

Filed May 2, 1906.

In the Supreme Court of the District of Columbia.

At Law. 48507.

THE UNITED STATES *ex Rel.* EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased,
v.
LESLIE M. SHAW, Secretary of the United States Treasury.

The relator, Emily E. Parish, Executrix of the last will and testament of Joseph W. Parish, deceased, says:

1. That she is a citizen of the United States and a resident of the District of Columbia; that the defendant is a citizen of the United States and at present a resident of said District. That on the 7th day of April, A. D. 1905, by virtue of the decree of the Supreme

Court of the District of Columbia, sitting as a Probate Court, she duly qualified as Executrix of the last will and testament of her father, Joseph W. Parish, deceased. The certificate of the Register of Wills of this District, showing her said appointment and qualification, marked "Relator's Exhibit No. 1," is filed herewith and made part of this petition.

2. That under and by virtue of an act of Congress approved May 31, 1872, the said J. W. Parish brought an action in the Court of Claims to enforce the rights accruing to him under a con-
2 tract made with the United States authorities on March 5, 1863, by said Parish, as J. W. Parish & Co. By said Contract the said Parish agreed to deliver at Memphis, Nashville, St. Louis, and Cairo, for the use of the United States Medical Department, the whole amount of ice required to be consumed during the remainder of the year 1863. The ice was to be in quality, "A. No. 1;" was to be subject to inspection; rates of payment for ice delivered at Nashville per ton, $25.00; at Cairo and Memphis, $20.00; at St. Louis, $15.00; three working days were allowed for discharging each cargo at either of the points mentioned. A copy of said original agreement, marked "Relator's Exhibit No. 2," is filed herewith, as part of this petition. On March 25, 1863, Joseph B. Brown, by instruction of Assistant Surgeon-General Wood, issued the following order:

"ASSISTANT SURGEON-GENERAL'S OFFICE,
SAINT LOUIS, MISSOURI, *March* 25, 1863.

Messrs. J. W. Parish & Co.

GENTLEMEN: I am instructed by the Assistant Surgeon-General to direct *that the ice which you have agreed to deliver* at the points designated in your contract *shall be distributed* in the following quantities, viz:

At St. Louis	5,000 tons
At Cairo	5,000 tons
At Memphis	10,000 tons
At Nashville	10,000 tons

making *the total of 30,000 which you have contracted to deliver.* The ice to be delivered at Nashville and Memphis is for use of the sick of the armies in the field and should be furnished without delay.

Very respectfully, your ob't servant,
By order of the Assistant Surgeon-General,
JOSEPH B. BROWN,
Surgeon, United States Army.

3 The said Parish immediately made his arrangements to execute the foregoing order "without delay."

3. Mr. Horace S. Cummings, an officer of the Executive Department to which Parish originally applied for redress, in a statement filed with the testimony taken in the Court of Claims, says: "From a personal inquiry, made at the Surgeon-General's office of Mr. Ram-

say, Chief Clerk, who was at the time conversant with the transaction, I learn that the meltage of Mr. Parish's ice was very small as compared with other dealers or contractors, as it generally averages 1/3 to 1/4, while Mr. Parish's average only between 1/7 and 1/8, of the amount delivered. It also appears that the price received per ton by Mr. Parish for ice in the Mississippi Valley was about $20, while the records of the Surgeon-General's office show that during the same period the Medical Department were obliged frequently to buy of private parties in the same section of the country and they paid on the average more than $60 per ton."

4. It therefore appears that said Parish was effectually performing his part of said contract with the Medical Department, when, on March 31, 1863, was sent the following:

"ASSISTANT SURGEON-GENERAL'S OFFICE,
ST. LOUIS, MISSOURI, *March* 31, 1863.

To J. W. Parish & Co. (care of C. H. Wicker & Co.), Chicago, Ill.:

I am instructed by the Surgeon-General to suspend the order I have given you till further instructions are given from him.

4 R. C. WOOD,
Assistant Surgeon-General."

5. In the trial in the Court of Claims, that Court finds in the 5th finding of fact: "It does not appear that this dispatch (viz of March 31, 1863) ever reached the claimant- or either of them. The claimant Parish did have knowledge of this notice by oral information from the Assistant Surgeon-General at St. Louis, on the 2nd day of April following."

The 6th finding of the Court of Claims is as follows: "Prior to the delivery to the said Parish of Joseph B. Brown's letter of March 25, 1863, set forth in finding V, the said Parish had purchased for delivery under the contract sued on 8,100 tons of ice; and, after delivery of said letter to him, he set about purchasing ice for delivery in pursuance of said letter; and thereafter, and before he was, on the 2nd day of April, 1863, apprised of the aforesaid order of Surgeon-General Hammond, of March 31, he had purchased, or contracted for the purchase of 23,000 tons of ice."

The 7th finding is: "The whole amount of ice which was received by the officers of the Government under said contract, omitting fractions, was as follows:

	Tons.
At St. Louis	4,174
At Cairo	1,388
At Memphis	6,456
At Nashville	750
Total	12,768

For this quantity the said Parish has been paid the contract prices."

5 Finding VIII. "Of the 23,000 tons of ice purchased by said Parish between the 25th of March and the 2nd of April,

1863, the quantity of 10,000 tons was purchased at Lake Pepin, in Minnesota; and in the month of April the stage of water in the Mississippi was such that, with a sufficiency of steamboats and barges present there in the early part of that month, that quantity might have been transported southward to St. Louis and the other places at which the said Parish was required by said contract to furnish said ice; but the said Parish did not have steamboats and barges at said lake in that month to transport the ice which he purchased there; and after that month the water in said river became and continued so low that the said ice could not be so transported southward, and the same melted and was lost to the said Parish."

Finding IX. "The said Parish was prepared and willing to deliver the said 30,000 tons of ice in conformity with the conditions and obligations of his said contract and the terms of said letter of March 25, 1863, of which the defendants had notice, but they would not nor did receive more than the 12,768 tons aforesaid."

Finding XI. "The notice of 25th of March, 1863, to the claimants, from the Assistant Surgeon-General's office at St. Louis set out in finding V, and which was suspended by order of the Surgeon-General, remained so suspended until the expiration of the time named in it for the duration of the contract of the 5th of March, 1863."

6. And now this relator says, that the majority of the Court
6 of Claims, speaking through Drake C. J., held: "In our judgment, the letter of Assistant Surgeon-General Wood was no part of the contract, and imposed no liability on the Government, and, as the claimant's case rests upon that, their petition must be dismissed." (12 Court of Claims p. 620.)

In a dissenting opinion of Nott J. (Peck J. concurring), which was afterwards in substance sustained by the U. S. Supreme Court, it is stated: "In the army when a superior officer amends, modifies, or changes the order of his inferior it immediately becomes his order. If the Assistant Surgeon-General had no authority *to order the claimant to deliver this ice "without delay," as he did*, the Surgeon-General, if he did anything, should have revoked the order and notified the contractor. He could not adopt it so as to keep it in suspense and at the same time declare that it never had vitality. To suspend it was to give it vitality if it had none, and to that extent to ratify it. * * * The fact that this contracor's commodiy was of the most perishable nature was a fact known to him when he agreed to deliver the amount of ice required to be consumed.

* * * That this ice proved a total loss to the contractor and that he did not involve himself in additional loss by trying to move it after the order was suspended, I deem immaterial. A large quantity of ice is not a commodity that can be handled and thrown upon the market in warm weather, nor sent forward and stored to await demand. * * * The order to deliver caused him to purchase it; the suspension of the order occasioned its loss." (*Id.* pp. 622, 623, 624.)

7. The case went up to the Supreme Court of the United
7 States, and that tribunal, in an opinion from which there was no dissent, concurred with the dissenting opinion in the

Court of Claims. Miller J., speaking for the Court, said: "We apprehend, if the case were reversed and the United States were suing for damages incurred by a refusal of the contractors to conform to this order, the amount specified being needed and not forthcoming, there would be no question of the validity of the notice of the Assistant Surgeon-General. * * * The order of the 25th of March, made within twenty days after the contract was signed was an unequivocal demand, *under that instrument*, that the amount of 30,000 tons, part of an unlimited quantity which might have been required of the contractor, should be delivered as therein directed. No one familiar with the climate and the sources of supply could doubt *that to enable him to fulfill this demand made at that season, required promptitude and diligence in securing the ice.* * * * They were, therefore, under an imperative necessity to prepare to fulfill this requirement."

8. The Supreme Court did indeed adjudge, that "to hold the Government to the contract price for all those amounts, they (Parish & Co.) should have delivered, or tendered, or offered to deliver, and demanded payment." But they also said: "as the Government left the demand suspended so that while claimants were compelled to purchase under the original orders, and *could not safely dispose of it while it remained unrevoked*, they are entitled to recover what they paid for the ice which was lost, and what expense they were at in making the purchase and in keeping it until it was lost." The Court therefore held, that "Claimants are entitled to the expenses
8 and losses incident to the preparation to meet the demand of the notice served on them. The cost of the ice purchased at Lake Pepin and lost, the expense bestowed upon its care, and the time and expense of making that purchase, and any sum actually lost in regard to the other 7,232 tons of ice purchased to enable them to meet that requirement, must form the measure of the plaintiff's recovery. Because these are not found by the Court of Claims, the judgment of court will be reversed, and the case remanded, that their damages may be ascertained and judgment entered accordingly." (Parish *v.* U. S., 100 U. S. 504-6.)

As will be seen from the report of the case, the opinion of Drake C. J., that said Parish was not justified in treating the order of the Assistant Surgeon-General as valid, was so untenable that it was abandoned, for as to this it is stated by Miller J.: "In the argument of the case before us the counsel for the Government abandons this view of the matter and we think properly."

9. Your relator says that whatever may have been the showing of the record in the U. S. Supreme Court the record in the Court of Claims left no doubt as to the total loss of 17,232 tons of ice. It showed the purchase by Parish of 10,000 tons at Lake Pepin from Wicker, and 6,000 more at Lake Pepin from Beasly. The 6,000 tons yielded to the same natural causes which put an end to the 10,000. The loss of the remaining 1,232 tons is accounted for by the testimony of Hennel Stevens, Medical Purveyor at Cairo from October 24, 1862, to the latter part of May, 1863, and from that time until August, 1865, at Memphis. It is unnecessary to recite the

evidence on this subject, since the fact of such total loss was
9 ascertained by a reference to the War Department, and in effect adjudicated by legislative act, to be hereinafter more particularly mentioned.

10. The Court of Claims, in response to the mandate of the U. S. Supreme Court held, that it could not, under, its rules, reopen the case for additional evidence, but on that before it made an award in favor of the claimant in the sum of $10,444.91. (16 Court of Claims 642.) The claimant then asked at the hands of Congress the means of satisfying so much of this claim, as the Court of Last Recort had adjudicated to be his unquestionable right. His claim was referred by the House Committee to the War Department, for report. The Surgeon-General found that the whole amount of undelivered ice, viz., 17,232 tons was lost to said Parish, and ascertained the cost thereof.

11. This relator therefore shows, that for 12,768 tons of ice furnished to the Government the petitioner had been paid the contract price. There had been left on his hands undelivered 17,232 tons of ice. The War Department reported back to Congress that, under the evidence taken before the Court of Claims and the additional evidence before it, Parish was entitled to be reimbursed on account of the ice not delivered, the sum of $58,341.85, in addition to the award of the Court of Claims, $10,444.91, to compensate him for the amount he had lost because of the non delivery of the 17,232 tons of ice. On the coming in of this report, by act of Congress of February 20, 1886, it was enacted: "That the Secretary of the Treasury be and he is hereby directed to pay to Joseph W.
10 Parish, late of Peoria, Illinois, out of any money in the Treasury, not otherwise appropriated, the sum of $58,341.85, being the balance of money laid out and expended by him in the purchase of 17,232 tons of ice, for the use and at the request of the Government of the United States, which were not afterward called for, or taken by the Government, but were wholly lost to said Parish." (24 Stat. 653-4.) There can be no gainsaying that this act is a legislative declaration, as conclusive as the judgment of a Court, fixing the fact of the purchase by said Parish, for the use and at the request of the Government, of 17,232 tons which were not afterwards called for, but were "wholly lost," and further determining what was honestly due him on this account, and ordering the same to be paid.

12. This relator further shows, that when the payment last mentioned was made the said Parish had received the contract price on the ice actually delivered, viz 12,768 tons; and in addition what he had actually spent and actually lost on account of the balance, viz. 17,232 tons of ice. That which was paid to him, after February 20, 1886, was only that which the U. S. Supreme Court adjudicated should have been paid to him on January 1, 1864. That is to say, the said Parish had not only lost the interest on this large sum of money for more than two decades, but had been forced to meet the expense of litigating his claim, and been subjected to the labors, anxieties, and trials of prosecuting the same.

13. So much had been placed beyond the field of discussion, when

evidently under the conviction that full justice had not been done, on the 17th of February, 1903, Congress passed a further act
11 as follows: "That the Secretary of the Treasury is hereby authorized and directed to make full and complete examination into the claim of Joseph W. Parish against the United States for balance alleged to be due him by virtue of a contract made by J. W. Parish & Co. with Henry Johnson, a medical storekeeper, acting on behalf of the United States, which act bears date March 5, 1863, and provides that said J. W. Parish and Company should furnish to the United States for the use of the Medical Department of the Army, the whole amount of ice to be consumed at Memphis and Nashville, Tennessee; St. Louis, Missouri, and Cairo, Illinois; during the remainder of said year 1863; that the Secretary shall determine and ascertain the full amount which should have been paid said J. W. Parish and Company, *if the said contract had been carried out in full* without change or default made by either of the parties thereto, under the rule of the measure of damages laid down by the Supreme Court of the United States in the case of the United States *v.* Behan, 110 U. S. 338, and in accordance with the evidence in the case collected by the United States Court of Claims, and *after determining the full amount thus due said J. W. Parish & Co. under said contract and rule of law aforesaid, to deduct therefrom all payments which have been made to said J. W. Parish & Co. or to said J. W. Parish, whether in pursuance of judgments of the Court or direct appropriation by Congress or otherwise, stating what balance if any, is due under the rule and evidence presented herein and pay the said balance to said Joseph W. Parish, the present owner of said claim; and sufficient money to pay such balance is hereby ap-*
12 *propriated out of any money in the Treasury which has not been otherwise appropriated.*" (32 Stat. 1612.)

14 Your relator submits, that the foregoing act is a plain, unambiguous direction to the Secretary of the Treasury to pay the claimant an amount which would be rendered certain upon the statement of the account by the proper Government accountant. If a reasonable doubt could exist as to the plain meaning of the act the able and learned reports of the Committees of the Senate and the House should efface it completely. The Senate Report states: "It is perfectly clear that the decision of the Supreme Court turned upon their own mistaken allegation that Parish never offered to deliver the ice. If he had offered to deliver it then the Court admits that his measure of damages would have been the contract price of the ice or the profits he might have made if he had done so * * * In the case of United States *v.* Behan (110 U. S. 338), which was decided four years later than the Parish case and which is now the rule, the Court laid down the rule as follows: "The *prima facie* measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely: First, what he has already expended towards performance less the

value of material on hand; Secondly, the profits that he would realize by performing the whole contract. The second item profits cannot always be recovered. They may be too remote and speculative in their character and, therefore, incapable of that clear and
13 direct proof which the law requires. But when, in the language of Chief Justice Nelson, in the case of Masterson *v.* Mayor of Brooklyn, they are "the direct and immediate fruits of the contract," they are free from this objection, they are then "part and parcel" of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfilment of any other stipulation. Still, in order to furnish a ground of recovery in damages, they must be proved. If not proved, or if they are of such remote and speculative character that they cannot be legally proved the party is confined to his loss of actual outlay and expenses." (Also See U. S. *v.* Speed *et al.* 8 Wall. 77.) In the Masterson *v.* Brooklyn case cited by the Supreme Court in the above quotation, the plaintiff contracted with the Corporation of Brooklyn to furnish all the Marble necessary for the erection of a certain public building, after part performance defendants refused to complete the contract. Held, that the measure of damages for that part of contract remaining unperformed at time of the breach was the difference between what the performance would have cost plaintiffs and the price which the defendants agreed to pay. The reasons for the application of this more equitable rule in the Behan case were not nearly so strong as in the Parish case. In the latter case the contract expressly provided what should be paid for the ice at the various places named. The profits, therefore, were readily and easily ascertainable. In fact that was the theory of the plaintiff in making his case before the Court of Claims and the record of that Court shows that the proofs on that point were explicit, bringing the case
14 within the principles laid down in Behan *v.* U. S. In a word, it is perfectly clear that the Supreme Court overlooked one of the most important findings of fact in the Parish case * * * Congress having therefore given only partial justice in *this case, there is no question but it is authorized to do complete justice to the claimant as this bill and the law* contemplates." The House Committee adopts this report and adds to it citation after citation confirmatory of Masterson *v.* Mayor 7 Hill 61; among others, authority to show "that a tender is not necessary where the party to whom it would be made has previously notified the party by whom it would be made that the tender would not be accepted, or the person to whom it might be made has placed himself in such a position as to make it clearly appear that if made it would be refused" * * * The error of the Supreme Court was due, we think, to overlooking the 9th finding of fact of the Court of Claims in Mr. Parish's case. In fact we cannot reconcile the decision of the Supreme Court with any other opinion * * * Your Committee, therefore, without further comment, are clearly of the opinion that the rule of damages announced in Masterson & Smith *v.* The Mayor of Brooklyn (7 Hill 61, 69) followed and approved in the Behan case, *supra*, is the true

measure of damages clearly applicable to claimant's case." This relator is advised that where the time for delivery is to be fixed by the buyer, the seller cannot be put in default until notified of the time when to deliver. A copy of said Act of February 17, 1903, together with the reports of the Committees of the Senate and the House, marked "Relator's Exhibit No. 3," is filed herewith and made part of this petition.

15 15. Your relator further says that whether or not the Committees of the two Houses of Congress were right in their confident assumption that the 9th finding of the Court of Claims was not brought to the attention of the U. S. Supreme Court, it is certain that the findings of the Court of Claims did not specify evidence in the record tending to show, and indeed conclusively establishing that every requirement of the rule as to tender had been complied with. In the deposition of Robert T. Cramer, Acting Medical Purveyor and Disbursing Officer in the Medical Department of the Armory at St. Louis, Missouri, between the 25th of March, 1863, and the 2nd day of April, 1863, the deponent states: "I remember a contract for furnishing ice to the Medical Department of the Armory, I think 30,000 tons. * * * The Contractor was J. W. Parish & Co. * * * I think the contract had been made in Washington, but the apportionment had been made, I think, at St. Louis. * * * It was on the 25th of March that I first saw him (Parish) and on that evening he left for Chicago." Q. "How soon after that did you see him again, as you now remember?" A. "It was during the early part of the next week. * * * He said he was prepared to furnish the ice." Cross Question—"You were not the proper officer to whom he should report his readiness to supply the 30,000 tons of ice, were you?" A. "I was the Chief Medical Disbursing Officer of the West; in addition to my having charge of the Medical Purveying Depot. I was the Medical Disbursing officer; I had possession of all the funds." Q. "Do you know whether Mr. Parish bought any ice after the first of April?" A. "I don't think he did, because he had told me, when he returned from Chicago, that he had

16 secured all the ice necessary to meet the contract." * * * Q. "Has your recollection as to some of the matters in this case been refreshed by any statements or suggestions of Mr. Parish in any of his letters?" A. "No, Sir. My memory has been refreshed by the correspondence I had with the Attorney-General, when I was requested to make replies to their communications; it was then that I hunted up everything that I had bearing upon the subject." Further direct question. "What quantity of ice did Mr. Parish state to you he was prepared to supply?" A. "He said, 'I have made all my contracts to furnish the 30,000,' and he wanted me, if I was in communication with my associates, to urge upon them the importance of securing it as soon as possible; that he was prepared to furnish the whole apportionment, 30,000 tons." (Rec. p. 193). The testimony of said witness is not contradicted nor impeached. It is, therefore, established. It sustains the 9th finding that said Parish was prepared and willing to deliver the whole 30,000 tons of ice in conformity with "the terms of said letter of March 25th, 1863, of which

the defendants had notice, but they would not, nor did, receive more than 12,768, tons aforesaid." Your relator once more says that the undisputed proof and said finding in accordance therewith demonstrates that full and ample tender was made by said Parish to the Medical Department, and notwithstanding such tender, as shown by the 11th finding, the suspending order of March 31, 1903, remained so suspended until the expiration of the time named for the duration of the contract. As is reiterated in the reports of the
17 two Committees, it was to give the said Parish, the full benefit of this that the act of February 17, 1903, was passed.

16. This relator further says, that, as stated in the Report of the Senate Committee, made a part of the Report of the House Committee, the profits legally due under the contract were readily and easily ascertainable; that the theory on which the plaintiff submitted his case in the Court of Claims, required just this proof, and that, "the record of that Court shows that the proofs on that point were explicit." The testimony of James L. Huse, shows the rate of transportation of ice during the Spring of 1863—by barges

From Lake Pepin to St. Louis.....	$5.00	per ton
" " " " Cairo	6.00	" "
" " " " Nashville	9.00	" "
From Cairo to Memphis.....	2.00	" "

As to rate by rail from Chicago to St. Louis, Cairo or Alton, the witness says: "From $5 to $6 would, I think, cover all the points." R. A. Scanlon, Government Superintendent of Transportation, from early in 1863 to the latter part of 1864, says, "the rate charged for the transportation of ice from Chicago to Cairo by rail, in the Spring and Summer of 1863, was $5 per ton." Isaac D. Harmon says they were the same to St. Louis. Peter Conrad says the rates from Lake Pepin to St. Louis were from $5 to $6 per ton; from Lake Pepin through to Memphis would make $2 per ton difference, and through to Nashville $2.50 to $3. Q. "Did you actually move ice between any two of the points named during the Spring of 1863?" A. "Yes, Sir." Q. "Between what two points did you move ice that season?" A. "From Lake Pepin to Memphis and from St.
18 Louis to Nashville." Louis A. Goodell deposed that ice could be brought from Lake to St. Louis in April and May, 1863, for about $5 per ton. * * * Q. "Will you swear that on the average of the season it could not be bought for less than $5, positively?" A. "Yes, Sir." The foregoing testimony received no word of contradiction from the defendant.

"The evidence collected by the Court of Claims" shows what would have been the price of transporting the non-delivered ice, with such certainty, that counsel for the Government in that Court, not only could not disprove but could not deny it, and in effect admitted what they were unable to dispute. This branch of the claimant's case was, therefore, conclusively established.

17. This relator further says that the Record in the Court of Claims shows the transportation of the ice from Lape Pepin and else-

where to have been perfectly practicable. Louis A. Goodell was asked, on cross examination, "Do steamers run on the Mississippi all Summer as far up as Lake Pepin?" A. "Yes, Sir, low water boats." Q. "Explain what you mean by that." A. "I mean a steam wheel boat that will draw about eighteen to twenty inches of water and can carry 100 or 150 tons and tow barges; I think they generally run the season through." The deponent had six barges at Lake Pepin. Q. "Did those all come down together?" A. "Yes, Sir." Q. "And would bring about how much?" A. "Well, the first trips I fetched down about 2,500 to 2,800 tons." * * * Q. "Can you state the latest trips that you came down the river?" A. "I think it was in July." James L. Huse states: "We were moving ice that year to all those points except Nashville and we trans-
19 ported ice to Nashville for several years succeeding that year." Q. "Did you during that season move any quantity of ice from Lake Pepin to either of the points you have named?" A. "We moved several thousand tons from Lake Pepin to St. Louis and points below." Q. 15. "Did you have any ice brought down from Lake Pepin by any other parties that season?" A. "We did a little that Summer." Isaac D. Harmon is asked: "State whether or not the claimants in his case had made preparations for transporting ice on the Mississippi river." A. "They had, so far as I was concerned. They had bought barges and employed tow boats. I remember about 2,000 tons on one barge they purchased." Joel H. Decker, being asked his opinion as to the ability and readiness of J. W. Parish & Co. to fulfill their contract, according to its terms, answered, "I know that they could have fulfilled it according to the terms of their contract. They were prepared and ready to fulfill it." A letter was proved and admitted in evidence, written at St. Louis, March 28, 1863, from Parish to C. A. Stevens & Co., in which the former stated: "I am getting boats and barges for Pepin Lake; I will have a fleet ready to start in ten days. Captain Davidson said he would take 3,000 tons from Lake Pepin to St. Louis for $5 per ton; I pay insurance he taking the usual risk. To get the ice bought of you out soon, I will give that amount and you can have him commence on your ice as soon as you can, as I would like to have it all aboard by the 10th."

18. This relator therefore says it is manifest that Congress did not seek to compel impossibilities in directing to be ascer-
20 tained, from the evidence in the case collected by the U. S. Court of Claims, the full amount due to said J. W. Parish. In point of fact, the statement of account so directed to be made was referred to the proper officer of the Government and of the Treasury, viz. to the Auditor for the War Department. Responding to the plain meaning of the act of February 17, 1903, the Auditor states the account as follows:

5,000 tons of ice at St. Louis, Mo.,	$5	per ton.....	$80,000
5,000 " " " " Cairo, Ill,	$20	" "	100,000
10,000 " " " " Memphis, Tenn,	$20	" "	200,000
10,000 " " " " Nashville, Tenn.,	$25	" "	250,000
			$630,000
From which deduct Payment by Medical Department.....		$129,783.33	
Settlements by 2nd Comptroller's office.....		171,072.69	
Award by Court of Claims.....		10,444.91	
Am't saved by non-delivered ice..... ...		137,385.12	
			448,641.05
Leaving balance due.....			$181,358.95

19. Your relator says that the foregoing account is so clear in itself, as to call for no aid of argument. Nevertheless, the same is fortified by the conclusions in writing of the Law Board of the office of the Auditor of the War Department, from which the following is extracted: "Said Committees, of Congress, were evidently satisfied with the evidence as to Mr. Parish's ability to have fulfilled
21 his contract and as to the loss of the ice. Congress itself was satisfied that Mr. Parish had made out a *prima facie* case, and was apparently entitled to the full amount of the profits prevented as well as of the losses sustained by the suspension of his contract, that is to an equivalent to the gains or profits he would have realized from the fulfillment of his contract: This statement is evidenced by the fact that Congress passed the act of February 17, 1903, directing the Secretary of the Treasury to determine and ascertain the full amount which should have been paid to J. W. Parish & Co., if the said contract had been carried out in full, without change or default made by either of the parties thereto; in other words, as if Parish had delivered the whole amount of ice contracted for, and the Government had received it, thus eliminating all questions of fact other than the cost of the delivery of the ice."

Further it is said: "If it should be deemed expedient or necessary to carry the investigation as to the claim under consideration farther than is required by the act of February 17, 1903, which authorizes and directs the Secretary of the Treasury to make full and complete examination into said claim, and to determine and ascertain the full amount which should have been paid to J. W. Parish & Co., if the contract had been carried out in full, and if the evidence in the case collected by the Court of Claims should be examined to ascertain from that source, first, whether or not the contractor had purchased sufficient ice to meet his obligations under his contract; second, whether or not the ice left on his hands had,
22 in consequence of the refusal to receive it, been lost to him, it would be found that all these points are fairly well sustained in the affirmative by the testimony. It would appear, first, that the contractor purchased considerably more ice than the required 30,000 tons, apparently having regard to unavoidable melt-

age before delivery; second, that the Court of Claims was justified in making its 9th finding of fact to the effect that Mr. Parish was prepared and willing to deliver the 30,000 tons of ice contracted for in conformity with the conditions of the letter of March 25, 1863, and that he tendered the whole 30,000 tons, but that the Government would not and did not receive more than 12,678 tons; and third, that the 8th finding of fact as to meltage and loss of ice at Lake Pepin, together with the declaration contained in the act of Congress approved February 20, 1886, (24 Stat. L. 653) that all the ice not called for, "was wholly lost to said Parish" are based on sworn testimony. Therefore, in conclusion it is stated by said Law Board, "that under the act of February 17, 1903, there is not a single question of fact to be determined, other than the amount saved to the contractor by the non-delivered portion of the ice, the calculation of the value of the ice contracted for, at the contract prices, and the deduction therefrom of all payments already made to the contractor and claimant, and also of the amount saved to the contractor by the non-delivery of the undelivered portion of the ice:" but further, "that the sufficiency of the evidence to prove the purchase of a single pound of the undelivered ice, between the 25th of March, 1863, and the 2nd day of April,
23 1863, by Joseph W. Parish & Co., or the loss of the same after the 31st day of March, 1863, is immaterial, in view of the provisions of the act of February 17, 1903." Hence it followed, "that after the determination of the amount saved to the contractor by the non-delivery of the undelivered portion of the ice, the case presents simply a mathematical proposition under the rule laid down for the measure of damages in the Behan case."

20. Your relator further shows that the said Auditor for the War Department sent to the said Joseph W. Parish, a letter bearing date August 11, 1903, as follows:

To Joseph W. Parish, care of Attorney J. H. McGowan, Washington, D. C.:

The claim filed by you for amount found due under act of Congress approved February 17, 1903, (Private No. 469) for ice under contract with J. W. Parish & Co., received in this office April 15, 1903, has been examined and settled as shown in the following statement and settlement certificate No. 23,729, transmitted to the Secretary of the Treasury for payment:

Amount claimed.	Amount disallowed.	Amount allowed.
		$181,358.95

A copy of this letter marked "Relator's Exhibit No. 4," is filed herewith as part of this petition.

21. And now this relator says that every condition precedent to payment to said J. W. Parish, in accordance with said act of February 17, 1903, had been satisfied by the examination and settlement made on August 11, 1903, by the Auditor for the War
24 Department; that thereby the exact sum due said claimant had been fixed; that the duty imposed by said act on the

Secretary of the Treasury was not an official duty, in the sense in which these words are accustomed to be used, but the performance of a particular duty imposed by special act, in order to secure justice to a private individual; that the examination and settlement of the account in question by the Auditor for the War Department, as the proper hand for the Secretary for this purpose, was the rendition of the justice and the performance of the duty contemplated by the act, and left nothing for judgment to determine, or for discretion to restrain or qualify; that what was not certain at the time of the enactment of February 17, 1903, was perceived to be capable of being rendered certain, and by said statement and account of August 11, 1903, had been rendered certain; that what would have been due said J. W. Parish, "if the said contract had been carried out in full, without change or default made by either of the parties thereto," was determined by the letter of the contract; that the determination of the "balance alleged to be due him by virtue of a contract made by J. W. Parish with Henry Johnson, a Medical Storekeeper, acting on behalf of the United States," called for the deduction from the amount due under said contract, of so much of the cost of transportation as had not been incurred and that, as stated by the Committee of both Houses: "The Record of the Court of Claims shows that the proofs on the point were explicit." The Auditor, therefore, proceeded upon proofs satisfactory to the Congress which passed the law and which that body directed should guide and govern the statement of account. From the result thus derived, the act directs to be subtracted "all payments which have been made to said Joseph Parish and Company, or to said Joseph W. Parish, whether in pursuance of judgments of the Court, or direct appropriation by Congress, or otherwise, stating the balance if any." There can be no doubt that this was honestly done by the Auditor, and the balance correctly stated. What was left to be done by the defendant was a purely ministerial act in obedience to and in execution of the clearly expressed will of the law making power, so that the said act of February 17, 1903, from and after the report or statement of account by said Auditor for the War Department became and was mandatory upon the defendant.

22. And now this relator shows, that, although every *prerquisite* had been fully complied with for the payment of such balance due said Parish, for which the said act of February 17, 1903, expressly appropriates sufficient money, "out of any money in the Treasury, not otherwise appropriated," nevertheless, the defendant, the said Leslie M. Shaw, Secretary of the Treasury, on the 31st day of May, 1904, declined and refused to pay said Joseph W. Parish the balance ascertained to be due by the Auditor for the War Department, or any balance or any sum whatever, and on the day aforesaid stated in express and positive terms that if said Parish was to be rewarded in any sum in excess of what had already been paid him, "Congress must fix the amount by specific appropriation." That is to say, the said Secretary positively refused to pay the balance found by the said Auditor to be due the said Parish or any part thereof.

26 Wherefore, since your relator has no remedy, save by this proceeding, she asks: That process may issue requiring the defendant, the said Secretary of the Treasury, to appear and answer this petition: That the writ of Mandamus may issue to said defendant requiring him to issue a draft in favor of this plaintiff for the sum of $181,358.95, so found due as aforesaid, by the Auditor for the War Department, and that a rule on said defendant may be granted, requiring him to show cause why such writ should not be granted, as aforesaid.

EMILY E. PARISH,
Executrix of Joseph W. Parish, Dec'd.

I do solemnly swear that I have read the petition by me subscribed, and know the contents thereof, and that the facts therein stated, upon my personal knowledge are true and those stated upon information and belief, I believe to be true.

EMILY E. PARISH.

Subscribed and sworn to before me this First day of May 1906.
[SEAL.]
HENRY E. TRIPP,
Notary Public, D. C.

27 Form No. 50.

RELATOR'S EXHIBIT No. 1.

Filed May 2, 1906.

In the Supreme Court of the District of Columbia, Holding a Probate Court.

DISTRICT OF COLUMBIA, *To wit:*

The United States of America to all persons to whom these presents shall come, Greeting:

Know ye, that the last will and testament of Joseph W. Parish, late, of the District of Columbia deceased, having been exhibited, proved and admitted to probate and record by said Court, and duly recorded in the office of the Register of Wills for the District of Columbia, the Clerk of said Court, Administration of all the money, goods, chattels, rights and credits of the said deceased was thereupon by said Court, on the 7th day of April, A. D. 1905, granted and committed unto Emily E. Parish who, as Executrix of the Will of said deceased, first executed a bond to the United States, with good and sufficient security, approved by the said Court, in the penalty of Five Hundred Dollars, conditioned for the faithful performance of her trust and took the oath prescribed and required by law; and whose appointment is unrevoked and still in force.

Witness the Honorable Harry M. Clabaugh, Chief Justice of said Court, this Seventh day of April, A. D. 1905.

Attest:
[SEAL.]
WM. C. TAYLOR,
Deputy Register of Wills for the District of Columbia, Clerk of the Probate Court.

Case No. 12677.

28 RELATOR'S EXHIBIT NO. 2.

Filed May 2, 1906.

"Article of agreement made this fifth day of March, 1863, between Henry Johnson, medical store keeper, United States Army, and Acting Medical Purveyor, Washington, D. C. on the one part, and Joseph W. Parish and William L. Huse, comprising the firm of Joseph W. Parish & Co., of the City of St. Louis, State of Missouri, of the other part, witnesseth:

That the said Henry Johnson, medical store keeper, United States Army, for and on behalf of the United States of America, and the said Joseph W. Parish and William L. Huse, comprising the firm of J. W. Parish & Co., for themselves, their heirs, executors and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other, in the manner following, viz:—

"First. That said J. W. Parish & Co. shall deliver at Memphis, Tennessee; Nashville, Tennessee; St. Louis, Missouri; and Cairo, Illinois, the whole amount of ice required to be consumed at each respective point and vicinity during the remainder of the year 1863. Ice to be in quality A No. 1, and delivered at two thousand (2,000) pounds to the ton.

Second. That for each and every ton of ice delivered at Nashville, Tennessee, and accepted by the medical officer in charge, the said J. W. Parish & Co. shall receive the sum of twenty-five dollars ($25).

Third. That for each and every ton of ice delivered at St. Louis, Missouri, and accepted by the medical officer in charge, the
29 said J. W. Parish & Co. shall receive the sum of sixteen dollars ($16).

Fourth. That for each and every ton of ice delivered at Cairo, Illinois, and accepted by the medical officer in charge, the said J. W. Parish & Co. shall receive the sum of twenty dollars ($20).

Fifth. That for each and every ton of ice delivered at Memphis, Tennessee, and accepted by the medical officer in charge, the said J. W. Parish & Co. shall receive the sum of twenty dollars ($20).

Sixth. All the ice delivered under this contract to be subjected to the inspection and approval of the medical officer in charge of the post where it is delivered, and such as does not conform to the specifications, set forth in this contract shall be rejected.

Seventh. That payments shall be made from time to time on receipted bills of lading and duplicate accounts certified to by the medical officer in charge of the post where it is delivered.

Eighth. No member of Congress shall be admitted to any share herein or any benefit to arise therefrom.

Ninth. It is further agreed that the said J. W. Parish & Co. will allow three (3) working days for discharging each cargo at either one of the points before mentioned; after that time demurrage to

be allowed by the said Henry Johnson, medical store keeper, United States Army, as per charter-party or bill of lading of the vessel.

In witness whereof the undersigned have hereunto placed their hands and seals the day and date above written.

[SEAL.]

HENRY JOHNSON,
Med. Store Keeper, U. S. A.,
Acting Med. Purveyor.
J. W. PARISH & CO."

30 RELATOR'S EXHIBIT No. 3.

Filed May 2, 1906.

(Private—No. 469.)

An act to refer the claim of Joseph W. Parish to the Secretary of the Treasury for examination and payment of any balance found due.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury is hereby authorized and directed to make full and complete examination into the claim of Joseph W. Parish against the United States for balance alleged to be due him by virtue of *of* a contract made by J. W. Parish and Company with Henry Johnson, a medical storekeeper, acting on behalf of the United States, which contract bears date March fifth, eighteen hundred and sixty-three, and provides that said J. W. Parish and Company should furnish to the United States for the use of the Medical Department of the Army the whole amount of ice required to be consumed at Memphis and Nashville, Tennessee; Saint Louis, Missouri, and Cairo, Illinois, during the remainder of the said year eighteen hundred and sixty-three; that the Secretary shall determine and ascertain the full amount which should have been paid said J. W. Parish and Company if the said contract had been carried out in full, without change or default made by either of the parties thereto, under the rule of the measure of damages laid down by the Supreme Court of the United States in the case of the United States against Behan (One
31 hundred and tenth United States Reports, three hundred and thirty-eight), and *with* accordance with the evidence in the case collected by the United States Court of Claims, and after determining the full amount thus due said J. W. Parish and Company, under the said contract and rule of law aforesaid, to deduct therefrom all payments which have been made to said J. W. Parish and Company, or to said Joseph W. Parish, whether in pursuance of judgments of the court or direct appropriation by Congress, or otherwise, stating what balance, if any, is due under the rule and evidence prescribed herein, and pay the said balance to said Joseph W. Parish, the present owner of said claim; and sufficient money to pay such balance is hereby appropriated out of any money in the Treasury which has not been otherwise appropriated.

Approved, February 17, 1903.

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57TH CONGRESS, 1st Session. } HOUSE OF REPRESENTATIVES. { REPORT No. 2104.

JOSEPH W. PARISH.

May 19, 1902.—Committed to the Committee of the Whole House and ordered to be printed.

Mr. Graff, from the Committee on Claims, submitted the following

REPORT.

[To accompany S. 475.]

The Committee on Claims, having considered Senate bill 475, recommend that the bill do pass without amendment. The facts are fully set forth in Senate Report No. 351, Fifty-seventh Congress, first session, as follows:

The Committee on Claims, to whom was referred the bill (S. 475) to refer the claim of Joseph W. Parish to the Secretary of the Treasury for examination and payment of any balance found due, having had the same under consideration, beg leave to make the following report and recommend the passage of the bill:

This claim has received several favorable reports in the House of Representatives, and was favorably reported to the Senate by the Committee on Claims during the Fifty-sixth Congress (Report No. 1628), which report fully sets forth the facts in the case, and is hereby adopted as the report of your committee.

The report referred to is as follows:

On the 5th day of March, 1863, Mr. Parish, in company with one William L. Huse under the firm name of J. W. Parish & Co., contracted with the United States to "deliver at Memphis, Tenn., Nashville, Tenn., St. Louis, Mo., and Cairo, Ill., the whole amount of ice required to be consumed at each respective point and vicinity during the remainder of the year 1863." This ice was intended for use in the hospitals and in the field for the sick and wounded soldiers of the Army.

The price to be paid for the ice, as the same should be delivered at these various points, was stipulated in the contract, and the quantity left to be determined by the Government.

The matter of quantity was quickly settled by the Assistant Surgeon-General in an order to the contractors, under date of March 25, 1863, fixing it at 30,000 tons. This order also directed 20,000 tons of the ice to be delivered at Nashville and Memphis "without delay." Thus in twenty days from its date the contract became definite and determined as to amount, price, places, and time of delivery.

Very soon after this contract was made Huse withdrew from the firm, and the entire interest on the part of the contractors became vested in said Parish.

The contractor at once commenced the purchase of ice, and within a week had succeeded in securing sufficient to fill the entire contract. Large portions of this were purchased at Ogdensburg and Kingston, on the St. Lawrence River, and at Lake Pepin, in Minnesota—long distances from places of delivery.

After such purchases were all made and the contractor stood ready to fulfill his contract he was notified by the said Assistant Surgeon-General that the Surgeon-General of the Army had directed that the order above referred to should be suspended "until further instructions." This suspension was never wholly removed. From that time to the close of the year 1863 (the date of termination of the
33 contract) the contractor was called upon by the proper medical officers to deliver only about 12,670 tons of ice, although it appears he was during all the time ready and desirous to deliver the full amount of 30,000 tons, as the Assistant Surgeon-General had directed, and frequently tendered the same.

Parish could not dispose of the ice he had purchased on the requisition of the Assistant Surgeon-General, because the order to purchase 30,000 tons was only "suspended" and he might be called upon at any moment to complete his contract, and if the ice had been disposed of it would have been impossible to obtain an additional supply. The contract terminated and the balance of the ice melted away and was a total loss.

The claimant first applied to the executive department of the Government for relief. After the delays incident to the prosecution of a claim before the departments, and utterly failing in his efforts in that direction, he applied to Congress.

On May 30, 1872, an act was approved which authorized the Court of Claims to hear and determine his claim. A large amount of testimony was taken at great expense and the case finally brought to a hearing. The court entered a decree dismissing the petition on the ground that Assistant Surgeon-General Wood had no authority to determine the quantity of ice that would be required, and that his action therein was wholly nugatory.

From this decree an appeal was taken to the Supreme Court. The decision below was reversed, the Supreme Court holding that the acts of the Assistant Surgeon-General were the acts of the Surgeon-General and bound the Government.

The facts in the case were found by the Court of Claims. They are reported in 12 Court of Claims Reports, 609-617. The ninth finding reads as follows:

"IX. The said Parish was prepared and willing to deliver the said 30,000 tons of ice in conformity with the conditions and obligations of his said contract and the terms of said letter of March 25, 1863, of which the defendants had notice, but they would not nor did receive more than the 12,768 tons aforesaid."

The Supreme Court entirely overlooked this finding, declaring that the claimant did not offer to deliver the ice. The result of this oversight was to cause the court to lay down a rule of damages inconsistent with the facts and unjust to the parties. That there may

be no misapprehension on this point we quote from the opinion of the court delivered by Justice Miller (10 Otto, 500):

"If claimants intend to treat the matter as a completed contract to deliver 5,000 tons at St. Louis, 5,000 at Cairo, 10,000 at Memphis, and 10,000 at Nashville, after the order of Brown, and to hold the Government to the contract price of all those amounts, they should have delivered, or tendered, or offered to deliver, and demanded payment.

"If the order had been revoked instead of suspended, and they intended to deny the right of the Government to revoke it, they must clearly have offered a delivery to make the Government liable. Had they offered to deliver, and been in condition to deliver, or, to use the old forms of declaration, if they had shown that they were ready and willing to deliver after such revocation, it would still remain a question as to the measure of damages, or, rather, whether the Government did not have a right to countermand the order and pay for what it actually received, and the necessary loss of claimants from the change of the order.

"In point of fact, the order was never revoked, but suspended, so that the claimants could not tell whether it would be revoked or revived, and they never made or offered to make delivery of the amount demanded by that order. The Government did require, accept, and pay for part of it. The balance was never delivered or tendered.

"Without elaborating the matter, we are of opinion that, as the claimants neither delivered nor offered to deliver the remainder, they can not recover either the contract price or the profits they might have made if they had done so; and as the Government left the demand suspended, so that while claimants were compelled to purchase under the original order, and could not safely dispose of it while it remained unrevoked, they are entitled to recover what they paid for the ice that was lost, and what expense they were at in making the purchase and in keeping it until it was lost."

It is perfectly clear that the decision of the Supreme Court turned upon their own mistaken allegation that Parish never offered to deliver the ice. If he had offered to deliver it, then the court admits that his measure of damages would have been "the contract price of the ice or the profits he might have made if he had done so."

But on the false assumption that no delivery was tendered, the court laid down the rule that the claimants were only "entitled to recover what they paid for the ice that was lost and what expense they were at in making the purchase and in keeping it until it was lost."

In the case of the United States *v.* Behan (110 U. S., 338), which was decided four years later than the Parish case, and which is now the rule, the court laid down the rule as follows:

"The *prima facie* measure of damages for the breach of con-
34 tract is the amount of loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract without the fault of the other party, who is willing to perform, the loss of the latter will consist of two distinct

items or grounds of damage, namely, first, what he has already expended toward performance less the value of material on hand; secondly, the profits that he would realize by performing the whole contract. The second item—profits—can not always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson in the case of Masterton *v.* Brooklyn (7 Hill, 69), they are the direct and immediate fruits of the contract, they are free from this objection; they are then 'part and parcel' of the contract itself, entering into and constituting a portion of its very elements; something stipulated for the right to the enjoyment of which is just and clear and plain as to the fulfillment of any other stipulation. Still, in order to furnish a ground of recovery in damages, they must be proved. If not proved, or if they are of such remote and speculative character that they can not be legally proved, the party is confined to his loss of actual outlay and expense." (Also see United States *v.* Speed *et al.*, 8 Wall., 77.)

In the Masterton *v.* Brooklyn case, cited by the Supreme Court in the above quotation, the plaintiffs contracted with the corporation of Brooklyn to furnish all the marble necessary for the erection of a certain public building. After part performance defendants refused to complete the contract. Held, that the measure of damages for that part of contract remaining unperformed at time of the breach was the difference between what the performance would have cost plaintiffs and the price which defendants agreed to pay.

The reasons for the application of this more equitable rule in the Behan case were not nearly so clear and strong as in the Parish case. In the latter case the contract expressly provided what should be paid for the ice delivered at the various places named. The profits, therefore, were readily and easily ascertainable. In fact, that was the theory of the plaintiff in making his case before the Court of Claims, and the record of that court shows that the proofs on that point were explicit, bringing the case properly within the principles laid down in Behan *v.* United States.

In a word, it is perfectly clear that the Supreme Court quite overlooked one of the most important findings of fact in the Parish case. At all events, there is no doubt that the law is properly stated in the Behan case. And all the present bill contemplates is a final and proper settlement on the rule of law which is older than our Republic, and is recognized everywhere as the only equitable one that can be applied in the premises.

The propositions contained in the bill which we here report were embraced in a House bill in the last Congress and favorably reported. In that report the committee state that "the bill directs the Secretary of the Treasury to make an examination into the claim of said Parish for balance alleged to be due him under a contract with the United States under the rule of damages prescribed by the Supreme Court of the United States *v.* Behan.

The pending bill fixes the rule which was followed by the Supreme Court in a case quite similar as to facts. It is the opinion of

your committee that the Secretary of the Treasury is the proper person to investigate this case, as provided for in the bill. The Department is in possession of all necessary data to make full investigation, as it has its own records and the full record of proceedings before the Court of Claims. This is a safe and orderly way to dispose of the matter at present.

If the United States still owes the claimant, this fact will be disclosed and he will be paid. If it does not owe him, that will also be brought to light, and in either event a final determination be reached.

Congress having heretofore given only partial justice in this case, there is no question but it is authorized to do complete justice to the claimant as this bill and the law contemplates.

Asst. Q. M. Gen. Robert Allen, who had charge of the Department of the Mississippi Valley during the civil war, with headquarters at St. Louis, Mo., and Louisville, Ky., in an official letter to Secretary of War Hon. W. W. Belknap, in March, 1873, said:

WASHINGTON, D. C., *March* 10, 1873.

DEAR SIR: The bearer of this, J. W. Parish, is a gentleman with whom I am well acquainted and can vouch for his integrity and trustworthiness in any condition of life.

Very truly,

ROBT. ALLEN,
Brevet Major-General and Assistant Quartermaster-General, U. S. A.

Hon. W. W. Belknap, *Secretary of War.*

35 General Allen, in another letter to the Secretary of War in 1873, commending the patriotic spirit of J. W. Parish & Co. and others that came under his notice, said:

"For such as came to the front in the dark hours of the Government's peril, with their money and credit, as did J. W. Parish & Co., Pomroy & Benton, Child, Pratt & Fox, of St. Louis; Solomon Sturgess & Sons, of Chicago, with other firms, ought now to be met by the Government with a liberal spirit, for they proved themselves true and patriotic citizens of the Republic, and their efforts were greatly appreciated at that time by Government officials at St. Louis and Washington, and of course were valuable to the regiments in the field, and surely deserve the best attention of Congress and the Executive Departments, for it is a well-known fact that in the beginning of the war their acts started many a regiment to the front, and at a time the Government was in a helpless condition, without money or credit."

Hon. C. A. Dana, Assistant Secretary of War, in an official report to Secretary Stanton, dated January 27, 1864, says that—

"Parish & Co. faithfully executed their contract for ice last year at considerable loss."

Bills for the relief of Mr. Parish were introduced in the Fiftieth Congress and each succeeding Congress. Some of these have proposed to remedy the alleged injustice by allowing interest, while others

ave provided for a direct appropriation. On at least five of these here have been favorable reports.

Your committee therefore recommend the passage of this bill, hich will safeguard the interests of the Government and do justice the claimant.

The following is made a part of the report:

In the Matter of the Claim of JOSEPH W. PARISH
v.
THE UNITED STATES.

Mr. Joseph W. Parish asks the Congress in S. 475 to let the facts f his claim, as disclosed by the evidence heretofore taken, go to the ccounting division of the Treasury Department for an investigaion and decision according to the rule of damages laid down by the upreme Court of the United States in the case of the United States *v.* Behan (110 United States, 338).

It may therefore be interesting to know when said rule was laid lown in the United States, and under what circumstances, and in hat class of cases.

This rule was announced with much clearness and force in 1845 n the case of Masterton & Smith *v.* The Mayor of Brooklyn (7 Hill, 1), and this is the case quoted by the Supreme Court of the United States in the Behan case, *supra*. Masterton & Smith contracted to deliver 88,819 feet of marble to be used in the construction of the ity hall of Brooklyn, and had delivered 14,779 feet, for which they had been paid the contract price, when the defendant suspended work and refused any more marble. The plaintiffs had on hand at the quarry at the time the defendant suspended further delivery 3,308 feet prepared for delivery. And, to use the language of the court, "The contest arose out of the claim for damages in respect to the remainder of the marble, which the plaintiffs had agreed to furnish, but which they were prevented from furnishing by the suspension of the work in July, 1837. This portion was not ready to be delivered at the time the defendants broke up the contract, but the plaintiffs were then willing and offered to perform in all things on their part, and the case assumes that they were possessed of sufficient means and ability to have done so."

In the American and English Encyclopedia of Law (2d edition), volume 8, page 622, we find the law of damages announced in the case of the United States *v.* Behan (110 U. S., 308) laid down as follows:

"Where profits are the very object of the contract: In many cases profits are the very object and inducement of the contract, and so understood by both parties, and then, therefore, they are not only recoverable, but constitute the true and exclusive measure of damages to the extent to which they may be ascertained."

In a note to the above section we find cases cited in the following States, where the above rule is laid down: Alabama, California, Georgia, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Michigan, Missouri, Nebraska, New York, North Carolina, Pennsylvania,

Tennessee, Texas, Utah, Virginia and Wisconsin. (Strauss *v.* Meertif, 64 Ala., 299, 307; Shoemaker *v.* Acker, 116 Cal., 239; Fell *v.* Newberry, 106 Mich., 542; Southerland on Damages (2d ed.), section 80).

In Williams *v.* Triplett (3 Iowa, 518, 531) the court said:

"On the day appointed he had the brick ready to deliver and so informed the plaintiff, who refused to receive them. * * * It was then not necessary for him to tender or deliver the brick. It is well settled that a tender or delivery may be dispensed with by the positive acts or declarations of the payee."

26 In Franklin *v.* Krum (70 Illinois App., 649, 652), which was a suit occasioned by the refusal to receive 900,000 feet of lumber, the court said:

"Apparently from the course of the trial, it seems that the appellant's contention was that from the making of the contract to the refusal of the appellant to carry out the same it was obligatory upon the appellees to have all the lumber on hand ready for delivery. Such is not the law. It was sufficient for the purposes of the contract if appellees had and were ready to deliver the lumber whenever appellant wished for it. Nor is the averment in the plaintiff's declaration, that from the execution of the contract, March 3, 1893, to the 1st day of November, 1893, they had been ready and willing to deliver all the lumber, compel appellees to prove that during this period they had in their possession all of such lumber. Nor were appellees, as is insisted, obliged to show that they tendered the appellant the lumber described in the contract."

In Nelson *v.* Elevating Company (55 N. Y., 480) it was said by Judge Allen:

"An actual tender of performance may be excused when there is a willingness and an ability to perform, and actual performance has been prevented, or expressly waived, by the party to whom performance is due."

The above quotation is approved by the Supreme Court of the State of New York in the case of Duryea *v.* Bonnell (45 N. Y., Supp., 435), and the court after approving the rule, laid down in Nelson *v.* The Elevating Company, *supra*, said:

"No tender was necessary, as the failure to deliver was produced by the defendant's refusal to receive," etc.

The Duryea case was an action by Duryea against Bonnell for refusal of defendant to receive a quantity of flour. The referee found that when defendant requested a quantity of flour from plaintiff, plaintiff would order the flour shipped from a mill direct to defendant, and that plaintiff owned no flour except as he purchased the same from the mill to fill orders. The court in passing on this case said:

"At the time when defendant should have taken the flour the firm was able and ready to deliver it. That it was not then delivered was the fault of the defendant. As he prevented the delivery in accordance with the terms of the contract we think it a salutary rule which holds him estopped from asserting that the firm did not go through all the technical forms of law in order to put him in

default. In order to permit the defendant now to assert that the firm was not ready to perform, when his own act prevented it, would permit his own breach of contract to constitute a defense, and he would advantage by his own wrong."

In support of the above see Ogden *v.* Marshall (8 N. Y., 340); Lawrence *v.* Miller (86 N. Y., 131); Eddy *v.* Davis (116 N. Y., 247); Hunter *v.* Wetsell (84 N. Y., 549).

It is laid down by Benjamin on Sales, that where there has been a breach of an executory contract of sale "if the postponement has taken place at the buyer's request he is estopped from denying that the seller was ready and willing to deliver within the contract time." (Benjamin on Sales, 6 ed., p. 664.)

The above doctrine, announced by Mr. Benjamin, has been followed by numerous courts in the United States, and among others the supreme court of the State of New York, as will be seen by examining the case of Duryea *v.* Bonnell, *supra;* and this doctrine is also laid down by the courts of England with approval. (Hockman *v.* Haynes, L. R., 10 C. P., 598; Ogle *v.* Earl Vane, L. R., 3 Q. B., 272.)

"It is not necessary, in order to maintain an action on the contract, to show actual tender; readiness and willingness is enough." (Tiffany on Sales, p. 179.)

In Kingsland, etc., Manufacturing Company *v.* St. Louis, etc., Company (29 Mo. App., 527) the court said:

"The law is that a tender is not necessary where the party to whom it would be made has previously notified the party by whom it would be made that the tender would not be accepted (McKnight *v.* Wilkins, 6 Mo. App., 118); or the person to whom it might be made has placed himself in such a position as to make it clearly appear that if made it would be refused."

In the syllabus of said case we find this language:

"The duty of offering to the defendant the article contracted for is dispensed with when the plaintiff has informed the defendant of their readiness for delivery, and asked for instructions, which the defendant refuses to give, or when the defendant has placed himself in a position from which it clearly appears that the offer would be refused."

In Scribner *v.* Schenkel (128 Cal., 250) the court, in substance, said: Where defendant received part of the hogs and paid for them, and declined to pay for more of them, there was a breach of the contract, and the plaintiff could enforce the contract without further delivery or offer of delivery, and the measure of damages is the difference between the contract price and the market price.

In the case of Dustan *v.* McAndrew (44 N. Y., 72, 78), the court said:

"A vendor of personal property in a suit against the vendee
37 for not taking and paying for the property has the choice ordinarily of either one of three modes to indemnify himself. (1) He may store or retain the property for the vendee, and sue him for the entire purchase price; (2) he may sell the property, acting as the agent for this purpose of the vendee, and recover the

difference between the contract price and the price obtained on such sale; or (3) he may keep the property as his own, and recover the difference between the market price at the time and place of delivery and the contract price."

The case of Hayden *v.* Demets (53d N. Y., 426, 429) was a suit to obtain the contract price for 50,000 pounds of copper. The court said:

"The goods were ponderous and bulky, and in such a case a manual delivery is unnecessary. It is enough if they are placed in the power of the vendee. * * * He had the copper and offered it to the defendants. The law requires good faith and such acts only as are practicable, and according to the thing tendered and the nature of the business."

The cases here cited, as well as all similar cases, applying the rule of damages announced in the Behan case, are cases in most instances, if not all, where the vendor has gone to expense and trouble to possess himself of the merchandise or goods necessary to meet his contract with the vendee. It may be that the vendor at expense and trouble has prepared to deliver marble from a quarry, or he may have bought machinery and raw materials and begun to manufacture goods to be delivered in fulfillment of his contract.

The reason for the rule of damages in question is therefore apparent. A less exacting rule would in many cases permit the vendee to take advantage of his own wrong to the very great injury of the vendor, who at much expense and trouble had prepared to comply with the terms of the contract.

Another reason for the rule, heretofore stated, is that such contracts as we now contemplate have for their very object the obtaining of profits, and this is well understood when the parties execute the same. And for this reason profits are recoverable because they constitute the true and exclusive measure of damages when ascertained.

The rule of damages which could have been invoked by the Government, provided Mr. Parish had not lived up to the terms of his contract, is one fraught with peculiar danger to one taking a contract like the one entered into by Mr. Parish.

If the Government had revoked the order suspending the delivery of the ice, and had again ordered the delivery of the same, what would have been the rule of damages in a suit on behalf of the United States against Mr. Parish, provided he had failed to deliver the ice? The following is undoubtedly the rule:

"In a contract for the sale of goods the measure of damages for failure to deliver is the difference between the contract price and the value of the article in the market at the time and place of delivery." (Rahm *v.* Deig, 121 Ind., 283, 287; Loescher *v.* Deisterberg, 26 Ill. App., 520; Faulkner *v.* Closter, 79 Iowa, 15; Messmer *v.* Lead Co., 40 N. Y., 422, 427.)

The Iowa case of Faulkner *v.* Closter was occasioned by the failure to deliver at Kirkman a carload of potatoes, 400 bushels, and the court in stating the rule of damages said:

"There seems to be no dispute as to the rule of damages in such

cases—that is, that the difference between the contract and market price at the point of delivery is the true rule," etc.

In the New York case of Messmer *v.* Lead Company, and the Indiana case of Rahm *v.* Deig, the courts lay down the rule as follows:

Where a person sells a merchantable article to another and fails to deliver, "the general rule is that the purchaser is entitled to recover the difference between the contract price and the value of the article in the market at the time and place of delivery."

Conclusion.

In the light of the undisputed facts of Mr. Parish's case, and the measure of damages clearly applicable to the same, it is apparent, we think, that the decision of the Supreme Court in Parish *v.* The United States (100 U. S., 500) is erroneous.

In an appeal from the Court of Claims to the Supreme Court of the United States only such statement of facts can be brought to the Supreme Court as may be necessary to enable it to decide upon the propositions of law ruled on by the Court of Claims, and that must be presented in the shape of facts found by the court and not by the evidence in detail. (De Groot *v.* The United States, 5 Wall., 419.)

The error of the Supreme Court was due, we think, to altogether overlooking the ninth finding of fact of the Court of Claims in Mr. Parish's case. In fact, we can not reconcile the decision of the Supreme Court with any other opinion. The ninth finding of fact is as follows:

38 "IX. The said Parish was prepared and willing to deliver the said 30,000 tons of ice in conformity with the conditions and obligations of his said contract and the terms of said letter of March 25, 1863, of which the defendants had notice, but they would not nor did receive more than the 12,768 tons aforesaid."

In the case of Parish *v.* The United States, *supra*, the court said: "If claimants intended to treat the matter as a completed contract to deliver 5,000 tons at St. Louis, 5,000 at Cairo, 10,000 at Memphis, and 10,000 at Nashville, after the order of Brown, and to hold the Government to the contract price for all those amounts, they should have delivered or tendered or offered to deliver, and demanded payment. * * * Had they offered to deliver, and been in condition to deliver, or to use the old forms of declaration, if they had shown that they were ready and willing to deliver after such revocation, it would still remain a question as to the measure of damages," etc.

Your committee, therefore, without further comment, are clearly of the opinion that the rule of damages announced in Masterton and Smith *v.* The Mayor of Brooklyn (7 Hill, 61, 69), followed and approved in the Behan case, *supra*, is the true measure of damages clearly applicable to claimant's case.

39 RELATOR'S EXHIBIT No. 4.

Filed May 2, 1906.

Notice of Allowance of Claim.

Treasury Department, Office of Auditor for the War Department.

Claim No. 143,880, File No. 58743.

WASHINGTON, D. C., *August* 11, 1903.

To Joseph W. Parish care of Attorney, J. H. McGowan, Washington, D. C.:

The claim filed by you for amount found due you under Act of Congress app'd Feb. 17, 1903 (Private No. 469) for ice under contract with J. W. Parish & Co., received in this office April 15, 1903, has been examined and settled, as shown in the following statement and settlement certificate No. 23729, transmitted to the Secretary of the Treasury for payment:

Amount claimed.	Amount disallowed.	Amount allowed.
		$181,358.95

Respectfully, F. E. RITTMAN, *Auditor*,
By W. A. R.

Copy.

"Any person accepting payment under settlement by an Auditor shall be thereby precluded from obtaining a revision of such settlement as to any items upon which payment is accepted * * * Any person whose accounts may have been settled by an Auditor of the Treasury Department * * * may, within a year, obtain a revision of the said account by the Comptroller of the Treasury, whose decision upon such revision shall be final and conclusive."—*Section* 8, *Act July* 31, 1894.

40 *Answer of Respondent.*

Filed June 2, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 48507.

UNITED STATES *ex Rel.* EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased,

vs.

LESLIE M. SHAW, Secretary of Treasury.

Answer of the respondent, Leslie M. Shaw, Secretary of the Treasury, to the rule to show cause and to the petition of the relator filed herein.

1. The defendant admits the averments of paragraph one. But defendant avers that the rights of said Joseph W. Parish under the

Act of Congress of February 17, 1903, in said petition referred to, if any such rights existed, were mere personal rights of the said Joseph W. Parish and were not property which could pass under his will, or to his personal representatives.

2. Defendant admits the averments of paragraph two.

3. Defendant admits that the statement was made by Horace S. Cummings as set forth in paragraph three, but says that the same is immaterial to the issues involved herein.

4. Defendant admits the sending of the letter copied in paragraph four, but denies that it appears that said Parish was effectually performing his part of the contract when the said letter was sent.

5. Defendant admits the averments of the fifth paragraph,
41 but says that the findings of the Court of Claims are absolutely immaterial to any issue involved herein, as the Act of Congress hereinafter referred to, and under which your defendant acted, provides that the said determination of your defendant shall be upon the evidence in said cause, and not upon any finding of said Court of Claims.

6, 7 & 8. Defendant, answering the sixth, seventh and eighth paragraphs of said petition, admits the said matters therein contained, but says that the said paragraphs contain matters of law and state no facts material to the issue involved herein.

9. Defendant neither admits nor denies that the 16000 tons of ice at Lake Pepin was lost, but denies that the 1232 tons of ice was lost; defendant further says that the statements in this paragraph are apparently findings of fact by the petitioner on the testimony before the Court of Claims, and that such findings by petitioner are not material, the said Act vesting in defendant the right to review said evidence and make such findings as seem right and proper to him.

10. Defendant admits the averments contained in the tenth paragraph of said petition, but says that the same are immaterial to any issue involved herein.

11. Defendant admits the passage of the Act of February 1886, and that the sum therein appropriated was paid to Joseph W. Parish, but defendant denies the conclusions of law attempted to be deducted from said Act as alleged in said paragraph.

12. Defendant admits that the payments were made as in said twelfth paragraph alleged, but says that the other averments
42 of said paragraph are wholly immaterial to any issue involved herein.

13. Defendant admits the passage of the Act of February 17, 1903, a copy of which is attached thereto in the petition as exhibit 3, but which is incorrectly quoted in said paragraph 13.

14. Defendant denies that the said Act of February 17, 1903, is a plain direction to defendant to pay the claimant an amount which would be rendered certain upon the statement of the account by the proper government accountant; but vested in your defendant the sole right and duty to determine what amount, if any, is due the said Joseph W. Parish. Further answering said paragraph defendant

says that the reports of the committees referred to are immaterial to any issue involved in the present case.

15. Answering the fifteenth paragraph the defendant says that the said Parish was not able to deliver said ice as in said paragraph alleged, and that defendant, after a full consideration of all of the evidence in the Court of Claims on this question, has decided that the said Parish was not able to deliver the said ice as in this paragraph alleged. Defendant further says that the matters and things set out in the fifteenth paragraph of said petition are wholly immaterial to any issue involved herein.

16. Defendant denies that the evidence collected in the Court of Claims showed the profits which would be due under the contract, or showed the cost of transporting the ice which was not delivered
43 under said contract. Defendant further says that the said Court of Claims found, as a fact, that said profits could not be ascertained, their finding being the twelfth specification, which reads as follows:

"XII. The profits which the claimant would have made upon 30,000 tons of ice, less 12,768 tons, to wit, 17,232 tons, if the same had been accepted by the defendants' officers in the manner prescribed by the order of 25th March, 1863, were $— per ton, amounting to $—. The loss sustained by the claimant upon the 10,000 tons of ice purchased and lost at Lake Pepin was $— per ton."

Defendant further says that the matters and facts contained in said sixteenth paragraph are wholly immaterial to any issue involved herein.

17. Defendant denies that the evidence in the Court of Claims shows that the transportation of ice at Lake Pepin and elsewhere was practicable. Defendant further says that after a thorough consideration of all of the evidence in the Court of Claims on this question, he decided that said transportation of ice from Lake Pepin was impracticable. Defendant further says that the matters and things set up in said seventeenth paragraph of said bill are wholly immaterial to any issue involved herein.

18. Defendant says, as will be hereafter more fully set forth, that defendant has determined and stated the full amount due said Parish in accordance with the evidence collected in the case in the Court of Claims, and under the rule for the measure of damages in the case of United States *v.* Behan. Defendant further admits that, as will be hereafter more fully set forth, defendant referred the case to the Auditor for the War Department for the latter's examination and advice thereon, and that the said Auditor examined and
44 stated the said account in the terms set forth in said paragraph; defendant further says that on the 26th day of January, 1904, the said Auditor revised his said statement and found that nothing was due the said Parish on said claim.

19. Defendant admits that the quotations in said paragraph are taken from a report made to said Auditor for the War Department by a clerk in his office under the title of "Law Board" which report was made by said clerk solely for the advice and assistance of said Auditor in making his report to defendant. Defendant says that

the averments of this paragraph are wholly immaterial to any issue in the present case.

20. Defendant admits that the said Auditor for the War Department sent to Parish a letter, a copy of which is set forth in said paragraph, but that said letter was sent before the said Auditor revised his said statement of said account. Defendant further says that the matters contained in said twentieth paragraph are wholly immaterial to any issue involved in this case.

21. Defendant denies each and every allegation contained in the twenty-first paragraph of said petition. Defendant further says that the allegations therein contained are wholly immaterial to any issue involved herein.

22. Defendant denies that every prerequisite for the payment of any money to Parish has been complied with.

Defendant further says that on the 31st day of May, 1904, he decided that under the said Act of Congress of February 17, 1903, there was no balance due to the said Parish, and therefore declined to pay any money to said Parish.

45 23. Further answering said rule to show cause and said petition, this defendant says:

That after the passage of the said Act of Congress of February 17, 1903, and at the request of said Parish, defendant, as Secretary of the Treasury, took up for consideration the said claim of said Parish; that thereupon defendant requested his subordinate, the Auditor for the War Department, to examine and settle the said account and to report to defendant his opinion and advice thereon; that the said Auditor examined the said account, and on the 11th day of August, 1903, stated the same as set forth in paragraph 18 of the petition, and on the same day transmitted his certificate of statement to defendant for his action; that on the 12th day of August, 1903, defendant referred said account to his subordinate, the Comptroller of the Treasury for re-examination, and for his opinion and advice thereon; and that said Comptroller re-examined the said claim, and on the 21st day of January, 1904, advised defendant that in his opinion there was nothing due to said Parish under said Act of February 17, 1903, and revised the said account; and that on the 26th day of January, 1904, pursuant to said revision of said Comptroller said Auditor cancelled the certificate theretofore made by him, and certified that there was nothing due said Parish on account of said claim; that defendant also referred the matter to the Solicitor of the Treasury and requested the latter's opinion and advice thereon, and on the 12th day of January, 1904, said Solicitor of the Treasury advised defendant that in his opinion there was nothing due

46 to said Parish under said Act of Congress on account on said claim. That thereafter, and pursuant to the authority and direction of said Act of February 17, 1903, defendant, acting in his official capacity as Secretary of the Treasury, made a full and complete examination into the claim of Joseph W. Parish against the United States for balance alleged to be due him under the contract described in said Act of Congress, and into the evidence in the case collected in the United States Court of Claims, and, after and upon

such full and complete examination, and upon full and deliberate consideration thereof, and of the said opinions and advice so theretofore at his request given to him by his said subordinates and the said Solicitor of the Treasury as hereinbefore set forth, and in the exercise of the judgment and discretion conferred upon him by said Act of Congress, did, on the 31st day of May, 1904, determine and ascertain the full amount which should have been paid said Parish if the said contract had been carried out in full, without change or default made by either of the parties thereto, under the rule of the measure of damages laid down by the Supreme Court in the said case of United States against Behan, and in accordance with the evidence in the case collected by the Court of Claims, and did deduct therefrom all payments which have been made to said Parish, and did determine and ascertain and state that, under the said rule and evidence, no balance is due to said Parish on account of said claim; a copy of said determination of this defendant is hereto attached marked "Exhibit A" and made a part hereof.

L. M. SHAW.

DANIEL W. BAKER,
Attorney for Defendant.

47 DISTRICT OF COLUMBIA, *ss:*

Leslie M. Shaw, being first duly sworn, upon his oath deposes and says that he is Secretary of the Treasury and as such secretary is the defendant named in the foregoing answer; that he has read the said answer, and that the matters and things therein set forth of his own knowledge are true, and those set forth upon information and belief he believes to be true.

L. M. SHAW.

Subscribed and sworn to before me this 25" day of May, A. D. 1906.

[SEAL.] JAS. N. FITZPATRICK,
Notary Public.

48 Filed June 2, 1906.

TREASURY DEPARTMENT, WASHINGTON, *May* 31, 1904.

In the Matter of the Claim of JOSEPH W. PARISH under Act of Congress Approved February 17, 1903.

After a careful examination of the contract with J. W. Parish & Co., referred to in the act, and the evidence taken before the Court of Claims, and construing both in the light of the opinion in the case of the United States *vs.* Behan, which, under said act, is to govern, I have reached the conclusion that there can be no recovery by J. W. Parish or J. W. Parish & Co., in excess of the amount already received by them.

This conclusion is to my mind irresistible upon any one of several theories. A contrary conclusion can be reached only by relying upon

a single clause of the act which directs the Secretary of the Treasury to determine and ascertain the full amount which should have been paid said J. W. Parish & Co. "if the said contract had been carried out in full without change or default made by either of the parties thereto." The claimant urges this construction, but seems to forget that if the contract had not been changed by a letter bearing date of March 25, 1863, there could be no recovery. The contract is for the delivery at certain points of the "whole amount of ice required to be consumed at each respective point and vicinity during the remainder of the year 1863." The claimant bases his right
49 to recover upon the modification of this contract by the letter referred to, which directs him to make immediate delivery of 30,000 tons. Certainly it was not the intention of Congress to ignore this letter; but if the interpretation sought by the claimant is to prevail strictly and literally, then the letter must be ignored. Of course the claimant asks that the letter ordering the immediate delivery of 30,000 tons of ice be made a part of the original contract.

But I do not think the language of the act justifies the exclusion of all that follows the phrase I have quoted, for it is separated only by a comma from specific instruction to continue the contract and the evidence "under the rule of the measure of damages laid down by the Supreme Court in the case of the United States *vs.* Behan." The letter of March 25, 1863, was an order for $630,000 worth of ice, and under that contract J. W. Parish & Co. have received, in one way and another, $311,275.91. If the phrase in the act contended for by claimant is to prevail, there was no occasion to refer the matter to the Secretary of the Treasury for computation, for a child would know that if there had been no default by either party there would still be due Parish & Co. $318,724.09. And it is reasonable to suppose that Congress would have appropriated that amount if it had intended that the claimant should receive that much.

The act forbids the claimant's conclusion, for it specifically provides that the computation shall be made "under the rule of the measure of damages laid down by the Supreme Court in the United States *vs.* Behan." The rule referred to, and which alone
50 must govern, gives the measure of damages where default has been made. It would have been idle and misleading to direct the Secretary of the Treasury to be controlled by a measure of damages applicable only when a vendee makes default, if the contract is to be construed as though no default had been made. The Behan case is applicable to the Parish & Co. claim only upon the theory that the United States did make default and did refuse to receive, or at least suspended its order for 30,000 tons of ice.

The evidence taken before the Court of Claims fails to cover some very important questions, and is vague and unsatisfactory upon other matters. The evidence is clear, however, that Parish & Co. purchased 10,000 tons, and there is some evidence to support their claim that they purchased 16,000 tons of ice on Lake Pepin. It is also reasonably clear that they purchased at various other places an aggregate of 18,343 tons. The firm delivered to the Government and received pay for 12,771 tons, and they have been paid the cost of the re-

mainder of the more than 34,000 tons claimed to have been purchased by them preparatory to the fulfilment of their contract. The present controversy is confined to prospective profits on the undelivered ice.

The evidence clearly shows that owing to a mild winter there was a short crop of ice, and the evidence is equally clear that there was a correspondingly ready market for ice during the summer of 1863; and that prices for ice were fabulously high. It is in evidence
51 that the Government, after making demand upon Parish & Co. under its contract, actually paid as high as $100 per ton for ice during that summer.

Parish & Co. claim that a portion of the ice purchased elsewhere than on Lake Pepin went to waste, and they claim prospective profits thereon. The ice purchased elsewhere than on Lake Pepin was all available for transportation, and if it went to waste it was because of neglect. No language in the Behan case, or in any other case, will justify a vendor in holding the subject of a rescinded sale, in the face of an advantageous market, until wasted or ruined by age, and then prosecuting an action for prospective profits. I consider it unthinkable that Parish & Co. did allow any ice purchased at points readily accessible by rail or water to spoil while declining to fill orders from the Government, and in the face of a market value many times the contract price.

This disposes of all but the ten or sixteen thousand tons of Lake Pepin ice. When Parish & Co. executed their contract to furnish all the ice that the Government might require at designated points on the Mississippi River, ordinary prudence required them to make preparation to fill such orders as might from time to time be received. I will not go so far as to conclude that Parish & Co. should have purchased 34,000 tons, though I do not think a purchase of that amount would be considered unreasonable, even in the absence of the letter of March 25, 1863.

But conceding Parish & Co. claim that their purchases on Lake Pepin would not have been made but for this letter, it
52 does not follow that they should have abandoned the Lake Pepin ice on the strength of the letter of the Assistant Surgeon-General, written six days later, suspending the order until "further instructions should be given." There is nothing in this subsequent letter of suspension to indicate that the Government had decided to accept any less amount than 30,000 tons, or that it had waived its right to demand 50,000 tons, or any other amount if more should be needed. The letter simply suspends the order for the immediate delivery of 30,000 tons "until further instructions are given." Parish & Co. as reasonable men, must act reasonably. On receipt of this letter Parish & Co. found themselves the owners of 16,000 tons of ice on Lake Pepin, and they were under contract to deliver to the Government, at certain places, all the ice it might require. As reasonable men they know there was but one season of the year when ice could be taken from Lake Pepin. It is in evidence that Parish & Co. fully understood the situation, for they sent a gang of men to Lake Pepin and held them there awaiting orders

for over a week, but because of low water no boats or barges could reach the lake. Unable to remove the ice which cost them in the main $2.50 per ton, it ultimately spoiled notwithstanding a market at $100 per ton down the river.

No language in the Behan case justifies the recovery of prospective profits for merchandise which the vendor not only fails to render, but is likewise unable to deliver. Conceding that when a contract is countermanded the vendor is excused from tendering the
53 subject of the sale, he certainly cannot recover without proof of ability to make delivery. For instance, Parish & Co. could not recover even the cost of ice purchased in Alaska to fill a contract subsequently rescinded, without proving that it was physically possible to deliver the ice from Alaska, and they could not recover prospective profits thereon without proof that it could be delivered under the contract at a profit. The evidence fails to show that at any time after March 25, 1863, Parish & Co. could have delivered the ice from Lake Pepin had they sought so to do. There had been put up during the previous winter on Lake Pepin by various parties, as the evidence shows, about 40,000 tons of ice, of which fully 34,000 tons were never moved, and at least one shipment of the 6,000 tons or so that were shipped all melted in transit. In view of the ice famine at Chicago and points south, it is evident that cheap transportation from Lake Pepin was wanting.

Counsel insist that because it is shown that at some times, in some years, and at one time in the year 1863, ice could have been and actually was taken from the lake to regularly navigable points on the river, therefore a recovery is authorized in this case. I reach no such conclusion. The natural and reasonable obligation of Parish & Co. to get the ice out of the lake to be ready to meet the suspended order, when the "further instructions" mentioned in the letter of suspension should be received, coupled with the fact that they did try and failed, is conclusive to my mind that it was impossible to deliver the ice, and if impossible, then prospective profits cannot be re-
54 recovered.

This view of the case is in strictest harmony with the familiar rule on which the claimant relies and by which the Secretary of the Treasury is to be controlled, as expounded, rather than promulgated, in United States *vs.* Behan. I quote from the opinion:

"The *prima facie* measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely: first, what he has already expended towards performance (less the value of materials on hand); secondly the profits that he would realize by performing the whole contract. The second item, profits, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires."

Parish & Co. have been paid the first of these two items. They

have been paid what they expended towards the performance of their contract, to-wit, the cost of the ice, and this they have been paid without deducting the value of the ice left on their hands. They seek to recover in this instance because of an alleged breach of contract. If there was a breach of contract that breach occurred on March 31, 1863, at which time they claim to have owned 16,000 tons of ice on Lake Pepin and a quantity of ice elsewhere. They have been paid the cost both of the Lake Pepin ice and the other undelivered ice purchased elsewhere, without deducting its value on March 31st. In other words, the Government has paid them the cost of the ice and then given them the ice.

This investigation relates solely to the second item referred to in the quotation from the opinion as "profits that would have
55 been realized by performing the whole contract." But the Court lays down the rule (and it is by this rule that the Secretary of the Treasury is to be governed in deciding this case) that profits cannot be recovered when "remote and speculative in character." Getting ice from Lake Pepin to the southern waters of the Mississippi River during the spring and summer of 1863 was admittedly a precarious enterprise, and the profits to be derived from such a transaction must be equally remote and speculative. The claimant invokes the rule laid down in United States *vs.* Behan, and that rule declares that profits cannot be recovered when "incapable of that clear and direct proof which the law requires." The Secretary of the Treasury is also directed in the act to confine his investigations to the evidence taken before the Court of Claims, and that evidence contains "no clear and direct proof" as to the profits that might have been made had the ice been delivered.

Parish & Co. brought suit in the Court of Claims originally for $60,000, which included prospective profits, and by an amended petition they increased their demand to $250,887.72. But counsel for Parish & Co. virtually concede that the evidence does not justify prospective profits, for they ask the Court of Claims in its finding of facts to fix their damages at $65,737.70.

The Act of Congress under which this investigation is being made limits the Secretary of the Treasury to the evidence taken before the Court of Claims. If the evidence there taken was insufficient to justify counsel for claimants to ask a finding covering pros-
56 pective profits, the same evidence is insufficient to allow the payment of prospective profits under the act.

Under the original contract Parish & Co. were to be paid "for each and every ton of ice delivered and accepted by the Medical Officer in charge." The fact that payments were to be made from time to time upon "receipted bills of lading and duplicate accounts certified by the Medical Officer in charge," constitutes no modification of the previous provision. The contract was to be completed by delivery of the ice at certain specified points. The subsequent clause concerning payments does not have the effect of rendering the contract complete by delivery of the ice f. o. b. cars or boats. Parish & Co. must have so understood the contract, for they purchased something over 34,000 tons with which to fill the order for

30,000 tons, and they have successfully prosecuted their claim for the cost of the entire purchase. This must be upon the theory that they were to be paid for the ice actually delivered, and that in order to deliver 30,000 tons, the purchase of 34,000 tons was not unreasonable. The evidence shows that some shipments of ice to Mississippi River points lost by meltage 33 per cent., and some shipments from Lake Pepin 100 per cent. The profits in shipping ice from Lake Pepin in 1863 are therefore "incapable of that clear and direct proof which the law requires."

The claimants have nothing of which they can legitimately complain. They contracted to deliver the "whole amount of ice required to be consumed at or in the vicinity" of certain points on the Mississippi River and its southern tributaries. The ice was to be
of quality "A No. 1." They were to receive pay "for each
57 and every ton of ice delivered and accepted by the Medical Officer in charge." As a matter of fact they have received pay for more than 1600 tons of melted ice ($31,743.00). They were to deliver all the ice required at these several points. But the fact appears of evidence that the Government made demand for ice which the claimants failed to deliver, and that thereafter the Government paid $100.00 per ton therefor, and it has never made a claim against Parish & Co. for damages. Under their contract to deliver all the ice that was required, they claim to have purchased 34,000 tons, some of it so situated that it could be easily delivered, and as the evidence shows, 10,000 or 16,000 tons at a point whence it could not be delivered. The Government has paid the contract price for all it has received, and has accepted and paid for 1600 tons of water, and has paid the claimants, in addition, all their expenses not only in connection with the 16,000 tons of ice at Lake Pepin, which the evidence fails to show could have been delivered, but also paid for upwards of 4,000 tons at available points, and has made no claim for the value of any of this ice left in the hands of Parish & Co. The original claim made by Parish & Co. in the Court of Claims was for $60,000. By an amendment subsequently filed the claim was increased to a little less than $252,000. After the evidence was all in, counsel for claimants asked judgment for a little over $65,000. The Court of Claims allowed $10,444, and by a special appropriation they have been paid $58,341 additional. This is $8,000 more than their original claim, and $3,000 more than was asked after the evi-
58 dence was all in. Counsel for the claimants now ask $181,358.95, which is the amount conceded to be due, if any thing, under the act. I reach the conclusion that nothing is due.

That J. W. Parish was an energetic, patriotic citizen there is abundant proof. He fitted a regiment at his own expense, and in many ways inspired the community in which he lived and the people whom he met with a spirit of patriotism at that time much needed. But if it is to be rewarded in any sum in excess of what has already been paid, Congress must fix the amount by specific appropriation.

L. M. SHAW.

59 *Demurrer to Defendant's Answer.*

Filed June 2, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 48507.

THE UNITED STATES *ex Rel.* EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased,

v.

LESLIE M. SHAW, Secretary of U. S. Treasury.

1. The plaintiff says the allegation in the first paragraph of respondent's answer, that the rights of said Joseph W. Parish, acquired under the Act of February 17, 1903, were not property which could pass to his personal representatives, is bad in substance.

NOTE.—One of the matters to be argued at the hearing of this demurrer is that said rights are in the category of rights of property, which do pass to the personal representative of said Parish.

2. The plaintiff says that the 4th paragraph of respondent's answer is bad in substance in that it states no facts to justify the denial contained therein.

3. The plaintiff says that the 5th paragraph of respondent's answer is bad in substance.

NOTE.—One of the matters to be argued at the hearing of this demurrer, is that said Act of Congress of February 17, 1903, does make the findings of the Court of Claims material, and does not permit the Secretary of the Treasury to substitute his own findings therefor.

60 4. The plaintiff says that the 9th paragraph of respondent's answer is bad in substance.

NOTE.—It will be argued at the hearing that the said paragraph states no fact to justify the denial "that the 1232 tons of ice was lost;" and further that it erroneously construes said Act, as "vesting in defendant the right to review said evidence and make such findings as seem right and proper to him."

5th. The plaintiff says that the 14th paragraph of respondent's answer is bad in substance.

NOTE.—It will be argued at the hearing of this demurrer that said paragraph erroneously construes the said Act of February 17, 1903; and further that as matter of law, "the reports of the Committees referred to" are material to the issue involved in the present case.

6. The plaintiff says that the 15th paragraph of respondent's answer is bad in substance.

NOTE.—At the hearing of this demurrer, it will be argued that the respondent's denial is insufficient, for the reason that it states no facts to justify it. It is therefore an insufficient denial.

7. The plaintiff says that the 16th paragraph of respondent's answer is bad in substance, for the reason among others, that no fact is stated therein to justify the denial. It is therefore an insufficient denial.

8. The plaintiff says that the 17th paragraph of respondent's answer is bad in substance, for the reason among others, that no fact is stated to justify the denial that the transportation of ice
61 was practicable. It is therefore an insufficient denial.

9. The plaintiff says that the 18th paragraph of respondent's answer is bad in substance.

NOTE.—It will be argued at the hearing of this demurrer, that the respondent has not stated the amount due said Parish under the rule for the measure of damages in U. S. *v.* Behan; and further that the respondent states no facts to justify his refusal to issue a warrant in accordance with the Auditor's report, or to justify his own arbitrary compulsion to the Auditor to cancel the arithmetical result the Auditor had been directed to ascertain, and had ascertained.

10. The plaintiff says the 21st paragraph of respondent's answer is bad in substance, for the reason that not one fact is stated to justify the denial of plaintiff's allegations therein contained. It is therefore an insufficient denial.

11. The plaintiff says that the 22nd paragraph of respondent's answer is bad in substance, for the reason that no facts are stated to justify the denial therein contained. It is therefore an insufficient denial.

12. The plaintiff says that the 23rd paragraph of respondent's answer is bad in substance.

NOTE.—At the hearing of this demurrer it will be argued, that said paragraph states no fact to justify the attempted re-cission by the Secretary of the Treasury of the account stated by the Auditor for the War Department on the 11th day of August 1903; nor any facts to warrant the steps thereafter taken by the respondent to give countenance to an arbitrary refusal to pay the sum, so found due to said J. W. Parish, by exact and competent computation, in the way provided by Congress.

62 13. The plaintiff says, that the whole answer of respondent is bad in substance.

NOTE.—At the hearing of the demurrer to respondent's answer, it will be argued:

a. That said answer is demurrable, unless it shows a right to refuse obedience, by the statement of facts, which justify such refusal clearly, specifically, and with such certainty, that the Court can see, that if admitted or established, they furnish a legal alternative for obedience to the writ;

b. That a demurrer to the assertion or denial of a legal conclusion, without showing the facts, which support or forbid such conclusion, must always be sustained.

c. That if any pleading misstates the effect of a Statute, the adverse party, in demurring, does not admit the correctness of the con-

struction claimed, or that the Statute imposes the obligation or confers the rights alleged;

d. That the return to the writ of mandamus must state all the facts relied upon by the respondent with such precision and certainty, that the Court may be fully advised of all the particulars, necessary to enable the Court to pass upon the sufficiency thereof; and the statements of the return cannot be supplemented by inference or intendment.

HOLMES CONRAD,
Of Counsel for Pet'r.
LEIGH ROBINSON,
Of Counsel for Plaintiff.

63 Supreme Court of the District of Columbia.

WEDNESDAY, *February 13th*, 1907.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice, presiding.

* * * * * * *

No. 48507. At Law.

THE UNITED STATES *ex Rel.* EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased, Petitioner,
vs.
LESLIE M. SHAW, Secretary of the United States Treasury.

This cause came on to be heard upon the petition, the rule to show cause issued thereon, the answer of respondent, exhibit and affidavit, and the demurrer to said answer. Whereupon, after argument thereon by attorneys for the respective parties, it is considered and adjudged that the prayers of the petition herein be, and hereby are denied, the rule to show cause discharged and the petition dismissed at the costs of petitioner.

From the aforegoing the petitioner by *his* attorneys in open Court, notes an appeal to the Court of Appeals. Whereupon, bond for costs is hereby fixed in the sum of One Hundred Dollars.

Memorandum.

February 19, 1907.—Appeal bond filed.

64 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of District of Columbia, hereby certify the foregoing pages, numbered from 1 to 63, both inclusive, to be a true and correct transcript of the record, according to Rule Five (5) of the Court of Appeals of the District

of Columbia, in cause No. 48507, at law, wherein The United States *ex rel.* Emily E. Parish, Executrix, &c., is Relator, and Leslie M. Shaw, Secretary of the United States Treasury, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 22d day of March, A. D., 1907.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1771. The United States *ex rel.* Emily E. Parish, executrix, &c., appellant, *vs.* George Bruce Cortelyou, Secretary of the United States Treasury. Court of Appeals, District of Columbia. Filed Mar. 22, 1907. Henry W. Hodges, clerk.

TUESDAY, *April 2nd, A. D.* 1907.

No. 1771.

THE UNITED STATES *ex Rel.* EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased, Appellant,

vs.

LESLIE M. SHAW, Secretary of the United States Treasury.

The retirement of Leslie M. Shaw, the appellee herein, and the appointment of George Bruce Cortelyou, as his successor as Secretary of the United States Treasury, having been suggested, It is, upon motion of Mr. Leigh Robinson, of counsel for the appellant, now here ordered by the Court that the said George Bruce Cortelyou, Secretary of the United States Treasury, be, and he is hereby, made the party appellee in this cause.

TUESDAY, *May 7th, A. D.* 1907.

No. 1771.

THE UNITED STATES *ex Rel.* EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased, Appellant,

vs.

GEORGE BRUCE CORTELYOU, Secretary of the United States Treasury.

The argument in the above entitled cause was commenced by Mr. Leigh Robinson, attorney for the appellant, and was continued by Messrs. J. C. Adkins and D. W. Baker, attorneys for the appellee, and was concluded by Mr. Holmes Conrad, attorney for the appellant.

No. 1771.

THE UNITED STATES *ex Rel.* EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased, Appellant,

v.

GEORGE BRUCE CORTELYOU, Secretary of the Treasury.

Opinion.

(Mr. Chief Justice SHEPARD delivered the opinion of the Court:)

This is a petition for a writ of mandamus to compel Leslie M. Shaw, as Secretary of the Treasury, to issue a draft in favor of the petitioner for the sum of $181,358.95 in payment of a claim referred to him by Act of Congress, approved February 17, 1903. The petition was filed May 2, 1906, and return made thereto by Leslie M. Shaw. After appeal perfected, Leslie M. Shaw resigned the office of Secretary of the Treasury, and George Bruce Cortelyou, as his successor in office, has been made a party in his stead.

Petitioner is the duly qualified executrix of the will of Joseph W. Parish who died April 7, 1905.

The material facts concerning which there is no substantial disagreement are these: On March 5, 1863, J. W. Parish & Co. (to whose right Joseph W. Parish succeeded) contracted with the United States to deliver to them all ice required to be used by their Medical Department during the remainder of that year. Deliveries were required to be made as required at Nashville for $25 per ton; at Cairo and Memphis for $20 per ton; and at St. Louis for $15 per ton. On March 25, 1863, the Department wrote the contractors that the ice contracted for must be delivered without delay as follows: at St. Louis 5000 tons; at Cairo 5000 tons; at Memphis 10,000 tons; and at Nashville 10,000 tons. March 31, 1863, an instruction was sent the contractors, and received by them April 2, 1863, suspending the order until further instructions. At that date 12,768 tons had been delivered and paid for at the contract price. The order of suspension was never recalled. Under the authority of an Act of Congress approved May 31, 1872, Parish brought suit against the United States, in the Court of Claims to enforce his demand under said contract. The Court of Claims dismissed the suit. 12 Ct. Cl., 620. On appeal, that judgment was reversed by the Supreme Court of the United States and the case remanded with direction to ascertain the damages sustained by the claimant. 100 U. S., 500. The Court of Claims then rendered a judgment for the claimant for the sum of $10,444.91. 16 Ct. Cl., 642. Claimant then petitioned Congress to satisfy as much of his claim as had not been allowed by the Court of Claims. Responding to a reference by a Committee of the House of Representatives, the War Department, through the Surgeon General, reported that the whole of the undelivered ice, through the order of suspension, amounted to 17,232 tons, and that the same had been lost by the contractor. The report also stated that under the evidence before the Court of Claims, and additional evidence before the Department, Parish was entitled to be re-imbursed, in addition to the judgment of the Court of Claims in the sum of $8,341.95, for the loss he had sustained because of the non-delivery of the 17,232 tons of ice. After this report, on February 20, 1886, Congress passed an act directing the payment of said sum of $8,341.85 to Parish, in addition to said sum of $10,444.91, "being the balance of money laid out and expended by him in the purchase of 17,232 tons of ice, for the use and at the request of the Government of the United States, which were not afterwards called for, but were wholly lost to said Parish." 24 Stat., 653. Parish again applied to Congress for relief and on February 17, 1903, the following Act was passed:

An act to refer the claim of Joseph W. Parish to the Secretary of the Treasury for examination and payment of any balance found due.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury is hereby authorized and directed to make full and complete examination into the claim of Joseph W. Parish against the United States for balance alleged to be due him by virtue

of a contract made by J. W. Parish and Company with Henry Johnson, a medical store-keeper, acting on behalf of the United States, which contract bears date March 5, 1863, and provides that said J. W. Parish and Company should furnish to the United States for the use of the Medical Department of the Army the whole amount of ice required to be consumed at Memphis and Nashville, Tennessee; St. Louis, Mo.; and Cairo, Ill., during the remainder of the said year 1863; that the Secretary shall determine and ascertain the full amount which should have been paid said J. W. Parish and Company if the said contract had been carried out in full, without change or default made by either of the parties thereto, under the rule of the measure of damages laid down by the Supreme Court of the United States in the case of the United States against Behan (One hundred and tenth United States Reports, three hundred and thirty-eight), and in accordance with the evidence in the case collected by the United States Court of Claims, and after determining the full amount thus due said J. W. Parish and Company, under the said contract and rule of law aforesaid, to deduct therefrom all payments which have been made to said J. W. Parish and Company, or to said Joseph W. Parish, whether in pursuance of judgments of the court or direct appropriation by Congress, or otherwise, stating what balance, if any, is due under the rule and evidence prescribed herein, and pay the said balance to said Joseph W. Parish, the present owner of said claim; and sufficient money to pay such balance is hereby appropriated out of any money in the Treasury which has not been otherwise appropriated."

"Approved, February 17, 1903."

The bill resulting in the Act aforesaid was accompanied by an elaborate Committee report, which is made an exhibit to the petition. This report gives a history of the Parish claim and the litigation concerning it. The findings of fact by the Court of Claims are set out and commented on, and it is said that the decision reported in 100 U. S., 500, is erroneous, because the Court overlooked the Ninth finding of the Court of Claims regarding Parish's readiness to deliver the remainder of the 30,000 tons of ice. The report, as a whole, is an argument in favor of Parish's right to further and complete compensation, and is relied on by the appellant as showing the plain meaning of the Act aforesaid, thereafter adopted. In the conclusion of the report, and referring to a former report, it is said:

"In that report the committee state that the bill directs the Secretary of the Treasury to make an examination into the claim of said Parish for balance alleged to be due him under a contract with the United States under the rule of damages prescribed by the Supreme Court of the United States in the case of the United States *v.* Behan.

"The pending bill fixes the rule which was followed by the Supreme Court in a case quite similar as to facts.' It is the opinion of your committee that the Secretary of the Treasury is the proper person to investigate this case, as provided for in the bill. The Department is in possession of all necessary data to make full investigation, as it has its own records and the full record of proceedings

before the Court of Claims. This is a safe and orderly way to dispose of the matter at present.

"If the United States owes the claimant, this fact will be disclosed and he will be paid. If it does not owe him, that will also be brought to light, and in either event a final determination be reached."

"Congress having heretofore given only partial justice in this case, there is no question but it is authorized to do complete justice to the claimant as this bill and the law contemplates."

The petition alleges that the matter was referred to the Auditor of the War Department after the passage of the Act aforesaid, who stated an account showing the entire contract price, and after deducting the various payments made to Parish, and the sum of $137,385.12 as "amount saved on non delivered ice," showed a balance due Parish of $181,358.95, of which he was notified. And a report of the "Law Board" of the Department is alleged, showing the approval of this account as being in accord with the intention of Congress as expressed in the Committee report and the Act aforesaid. The petition alleges that this report of balance was authoritative, and all that remained for the respondent "was a purely ministerial act in obedience to and in execution of the clearly expressed will of the law-making power, so that the said Act of February 17, 1903, from and after the report or statement of account of said Auditor for the War Department became and was mandatory upon the defendant." The prayer is for a writ of mandamus requiring the respondent, as Secretary of the Treasury, to issue a draft to the petitioner for the said sum of $181,358.95, as found by the Auditor. Some extracts from the evidence before the Court of Claims, and the Surgeon General thereafter, are given in the petition, but there is no transcript of the entire evidence in either the petition or the return thereto.

The return of the respondent admits the general facts before recited, but denies the conclusions therefrom. The material allegations of the return are the following:

"15. Answering the fifteenth paragraph the defendant says that the said Parish was not able to deliver said ice as in said paragraph alleged, and that the defendant, after a full consideration of all the evidence in the Court of Claims on this question, has decided that the said Parish was not able to deliver said ice as in this paragraph alleged.

"16. Defendant denies that the evidence collected in the Court of Claims showed the profits which would be due under the contract, or showed the cost of transporting the ice which was not delivered under said contract.

"17. Defendant denies that the evidence in the Court of Claims shows that the transportation of ice at Lake Pepin and elsewhere was practicable. Defendant further says that after a thorough consideration of all the evidence in the Court of Claims on this question, he decided that said transportation of ice from Lake Pepin was impracticable.

"18. Defendant says, as will be hereafter more fully set forth, that defendant has determined and stated the full amount due said

Parish in accordance with the evidence collected in the case in the Court of Claims, and under the rule for the measure of damages in the case of United States *v.* Behan. Defendant further admits that, as will be hereafter more fully set forth, defendant referred the case to the Auditor for the War Department for the latter's examination and advice thereon, and that the said Auditor examined and stated the said account in the terms set forth in said paragraph; defendant further says that on the 26th day of January, 1904, the said Auditor revised his said statement and found that nothing was due the said Parish on said claim.

"19. Defendant admits the quotations in said paragraph are taken from a report made to said Auditor for the War Department by a clerk in his office under the title of "Law Board" which report was made by said clerk solely for the advice and assistance of said Auditor in making his report to defendant.

"22. Defendant denies that every prerequisite for the payment of any money to Parish has been complied with.

"Defendant further says that on the 31st day of May, 1904, he decided that under the said Act of Congress of February 17, 1903, there was no balance due to the said Parish, anad therefore declined to pay any money to said Parish.

"23. Further answering said rule to show cause and said petition, this defendant says:

"That after the passage of the said Act of Congress of February 17, 1903, and at the request of said Parish, defendant, as Secretary of the Treasury, took up for consideration the said claim of said Parish; that thereupon defendant requested his said subordinate, the Auditor for the War Department, to examine and settle the said account and to report to defendant his opinion and advice thereon; that the said Auditor examined the said account, and on the 11th day of August, 1903, stated the same as set forth in paragraph 18 of the petition, and on the same day transmitted his certificate of statement to defendant for his action; that on the 12th day of August, 1903, defendant referred said account to his subordinate, the Comptroller of the Treasury for re-examination, and for his opinion and advice thereon; and that said Comptroller re-examined the said claim, and on the 21st day of January, 1904, advised defendant that in his opinion there was nothing due to said Parish under said Act of February 17, 1903, and revised the said account; and that on the 26th day of January, 1904, pursuant to said revision of said Comptroller said Auditor cancelled the certificate theretofore made by him, and certified that there was nothing due said Parish on account of said claim; that defendant also referred the matter to the Solicitor of the Treasury and requested the latter's opinion and advice thereon, and on the 12th day of January, 1904, said Solicitor of the Treasury advised defendant that in his opinion there was nothing due to said Parish under said Act of Congress on account of said claim. That thereafter, and pursuant to the authority and direction of said Act of February 17, 1903, defendant, acting in his official capacity as Secretary of the Treasury, made a full and complete examination into the claim of Joseph W. Parish against

the United States for balance alleged to be due him under the contract described in said Act of Congress, and into the evidence in the case collected in the United States Court of Claims, and, after and upon such full and complete examination, and upon full and deliberate consideration thereof, and of the said opinions and advice so theretofore at his request given to him by his said subordinates and the said Solicitor of the Treasury as hereinbefore set forth, and in the exercise of the judgment and discretion conferred upon him by said Act of Congress, did, on the 31st day of May, 1904, determine and ascertain the full amount which should have been paid said Parish if the said contract had been carried out in full, without change or default made by either of the parties thereto, under the rule of the measure of damages laid down by the Supreme Court in the said case of United States against Behan, and in accordance with the evidence in the case collected by the Court of Claims, and did deduct therefrom all payments which have been made to said Parish, and did determine and ascertain and state that, under the said rule and evidence, no balance is due to said Parish on account of said claim; a copy of said determination of this defendant is hereto attached marked "Exhibit A" and made a part hereof."

As an exhibit to the return is attached the decision of the respondent made May 31, 1904, denying the claim. This decision is embraced in five printed pages of the record, and contains a review of the entire case, and the reasons of the respondent for his conclusion.

The petitioner demurred to the return. On February 13, 1907, the order of the Court recites: "This cause came on to be heard upon the petition, the rule to show cause issued thereon, the answer of respondent, exhibits and affidavit, and the demurrer to said answer; and thereupon the denial of the prayer, the discharge of the rule to show cause, and the dismissal of the petition with costs." From this order the petitioner has appealed.

1. A preliminary question involving the right of the petitioner, as executrix of the will of Joseph W. Parish, to maintain the action under the Act of February 17, 1903, is raised by the first paragraph of the return, in the nature of a demurrer, and must be first considered. The contention is that the statute was passed solely for the relief of Joseph W. Parish, and makes no provision for the succession of his personal representatives. This is true, but, the Act creates or recognizes the right of said Parish to the payment of money, and makes an appropriation therefor. Assuming, for present purposes, that the plain, simple duty was imposed upon the Secretary of the Treasury to make that payment, a right of action accrued to Parish for the enforcement of that duty. For manifest reasons the action of debt or assumpsit would not lie, and the only proceeding left to the party was in mandamus to compel payment. It is the appropriate action at law to recover the money, and is subject to the principles governing such actions. Louis *v.* Brown Township, 109 U. S., 162, 166. As there is no apparent reason why the right should be limited to Joseph W. Parish solely, and there is nothing in the Act expressly negativing its succession in case of his death, we are of

the opinion that the right to enforce the demand, if it can be enforced at all, survived, and passed to his personal representative.

2. The contention of the petitioner that the statement of the claim made by the Auditor of the War Department, an officer subject to the direction of the Secretary of the Treasury, and the ascertainment of the balance due Parish by him, were binding upon the Secretary, and left nothing for him to do but issue the draft for the amount as found, is untenable. The duty of adjusting the claim, of whatsoever nature that duty may be, as well as of making the payment of the amount awarded, was imposed by the statute, in express terms, upon the Secretary of the Treasury, and upon no one else. The Act is quite different from that under consideration in Kendall *v.* U. S., 12 Pet., 522, 610. By that statute, the duty of adjusting the account and ascertaining the credit due the claimant was devolved expressly upon the Solicitor of the Treasury. When adjusted by him, the single duty of carrying the ascertained sum to the credit of the party was imposed upon the Postmaster General. He was vested with no discretion or control over the decision of the Solicitor, and with no right of review thereof. While the Secretary of the Treasury might, probably, have delegated the duty of stating the claim to Parish, in the first instance, to the Auditor or any other skilled employee of his department; and might have approved and adopted the report and made it his own decision under the Act, he was not bound to do so. Moreover, his return shows that he did not adopt the report of the Auditor, and that that officer revised his views and made another statement to the effect that nothing was due the claimant. The return further shows that the Secretary, in person, took the entire matter under consideration, as required by the Act, and made a decision to the effect that nothing was due.

3. The substantial question in this case is the effect to be given to the Act of February 17, 1903. If it imposes a plain ministerial duty upon the Secretary of the Treasury, then the performance of the duty may be compelled. As has been said by the Supreme Court of the United States: "If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer." Roberts *v.* U. S., 176 U. S., 221, 231.

On the other hand, if it does not impose upon him the plain duty of ascertaining a balance due Parish by a mere computation, on plain lines laid down for his guidance, but requires him to ascertain facts and makes an application thereto of a prescribed measure of damages; in other words, if it requires the exercise of any discretion on his part in reaching a conclusion, then it is beyond the power of the courts to control the exercise of that discretion. Riverside Oil Co. *v.* Hitchcock, 190 U. S., 316, 324. And in such a case, the question is not whether he has made a correct decision, but whether he has decided at all. It is not for the courts to determine whether he has decided wrongly. U. S. *ex rel.* West *v.* Hitchcock, 26 App. D. C., 290, 295; S. C. Sup. St. U. S., March 4, 1907. Tested by these prin-

ciples, we think there was no error in denying the petition. If it be true, as contended for their report, that the Committees of Congress regarded the claim as an entirely just one for the entire amount of the contract price, and considered that all that was necessary to ascertain the exact amount was a simple calculation, of which any ordinary person is capable, that intention could have been readily and plainly expressed. As an expression of such an intention, the language of the Act was, to say the least, unfortunately chosen. That it is ambiguous is well demonstrated by the radically different views of its meaning taken by the claimant, and by the Secretary, whose perfect good faith must be presumed. The Act, after reciting the substance of the contract, provides, "that the Secretary shall determine and ascertain the full amount which should have been paid to J. W. Parish and Company if the said contract had been carried out in full, without change or default made by either of the parties thereto." * * * Had it stopped there, the meaning contended for would be plain enough. But as the contract had not been "carried out in full without change or default made by either of the parties thereto," it was deemed necessary to determine the claimant's damages, by reason of the fact that the contract had not been carried out through the change and default of the representatives of the United States, charged with its execution. Consequently, the Act proceeded to recite in the same sentence, with the interposition of a comma: "under the rule of the measure of damages laid down by the Supreme Court of the United States in the case of United States *v.* Behan (one hundred and tenth United States Reports, three hundred and thirty-eight), and *in accordance with the evidence in the case collected by the United States Court of Claims*, and after *determining the full amount thus due* said J. W. Parish & Company, *under the said contract and rule of law aforesaid*, to deduct therefrom all payments which have been made to said J. W. Parish and Company, or to said Joseph W. Parish, whether in pursuance of judgments of the Court or direct appropriations by Congress, or otherwise, *stating what balance, if any, is due under the rule and evidence prescribed herein*, and pay the said balance to said Joseph W. Parish, the present owner of said claim"; sufficient money being also appropriated for the purpose. The rule for the measure of damages is thus declared in the case designated (U. S. *v.* Behan, 160 U. S., at p. 344): "The *prima facie* measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely: first, what he has already expended towards performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract. The second item, profits, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson, in the case of Masterson *v.* Mayor of Brooklyn, 7 Hill, 69, they are 'the

direct and immediate fruits of the contract,' they are free from this objection; they are then 'part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation.' Still, in order to furnish a ground of recovery in damages they must be proved. If not proved, or if they are of such a remote and speculative character that they cannot be legally proved, the party is confined to his loss of actual outlay and expense."

Having prescribed this as the applicable rule, the next direction was to apply it, not to the facts recited in the report or to the findings of fact by the Court of Claims, but "to the evidence in the case collected by the United States Court of Claims." What this evidence was as a whole we are not advised. The Secretary says of it in his decision: "The evidence taken before the Court of Claims fails to cover some very important questions, and is vague and unsatisfactory upon other matters." His general conclusion from the whole of it is that it does not show that Parish was ready to deliver, and could have made delivery of the whole of the ice if the suspension of the contract had been recalled; and that the payments heretofore made to him exceed the loss which he actually sustained. He was commanded to consider the evidence, to apply the rule of law to it, and to render a decision. This involved the exercise of some discretion; and whether or not he erred in his decision, is a matter which the Courts have no right to determine. They are vested with no power of review.

It follows that the judgment must be affirmed with costs; and it is so ordered.

Affirmed.

TUESDAY, *June 4th*, A. D. 1907.

No. 1771, April Term, 1907.

THE UNITED STATES *ex Rel.* EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased, Appellant,

vs.

GEORGE BRUCE CORTELYOU, Secretary of the United States Treasury.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause, be, and the same is hereby, affirmed with costs.

Per MR. CHIEF JUSTICE SHEPARD.

June 4, 1907.

MONDAY, *June 10th, A. D.* 1907.

No. 1771.

THE UNITED STATES *ex Rel.* EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased, Appellant,

vs.

GEORGE BRUCE CORTELYOU, Secretary of the United States Treasury.

On motion of Mr. Leigh Robinson, of counsel for the appellant, It is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond for costs is fixed at the sum of three hundred dollars. And it is further ordered that the mandate in said cause be stayed until further order of Court.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you between The United States *ex rel.* Emily E. Parish, Executrix of Joseph W. Parish, deceased, appellant, and George Bruce Cortelyou, Secretary of the United States Treasury, Appellee, a manifest error hath happened, to the great damage of the said Appellant as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 10th day of June, in the year of our Lord one thousand nine hundred and seven.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

____ ____,

_____.

(Bond on Writ of Error.)

Know all Men by these Presents, That we, Emily E. Parish, Executrix, as principal, and Grant Parish, as surety, are held and firmly bound unto George B. Cortelyou, Secretary of the United States Treasury in the full and just sum of three hundred dollars ($300.00) to be paid to the said George B. Cortelyou, Secretary of the United States Treasury his certain attorney, executors, administrators, or assigns; to which payment, well and truly to *to* be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 11th day of June, in the year of our Lord one thousand nine hundred and seven.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between the United States, *ex rel.* Emily E. Parish, Executrix of Joseph W. Parish, deceased, appellant, *vs.* George B. Cortelyou, Secretary of the United States Treasury, a judgment was rendered against the said Emily E. Parish, Executrix, and the said Emily E. Parish, Executrix, having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said George B. Cortelyou, Secretary of the United States Treasury citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Emily E. Parish, Executrix of Joseph W. Parish, deceased, shall prosecute said writ of error to effect, and answer all costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

EMILY E. PARISH. [SEAL.]
GRANT PARISH. [SEAL.]

Sealed and delivered in the presence of—
MONCURE BURKE.

O. K.—D. W. B.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals
of the District of Columbia.

[Endorsed:] No. 1771. The U. S. *ex rel.* Emily E. Parish, Executrix, &c., Appellant, *vs.* George Bruce Cortelyou, Secretary of the United States Treasury. Bond for costs on Writ of Error to Supreme Court, U. S. Court of Appeals, District of Columbia. Filed Jun 12, 1907. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To George Bruce Cortelyou, Secretary of the United States Treasury, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein The United States *ex rel.* Emily E. Parish, Executrix of Joseph W. Parish, deceased, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard Chief Justice of the Court of Appeals of the District of Columbia, this 12th day of June, in the year of our Lord one thousand nine hundred and seven.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted.
DANIEL W. BAKER,
Att'y for Appellee.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun-12 1907 Henry W. Hodges, Clerk.

Assignment of Errors on Appeal to the Supreme Court of the United States.

THE UNITED STATES *ex Rel.* EMILY E. PARISH, Executrix of Joseph W. Parish, Deceased,

v.

GEORGE BRUCE CORTELYOU, Secretary of the United States Treasury.

Writ of Error to the Supreme Court of the United States from decree of June 4th, 1907, passed by the Court of Appeals of the District of Columbia, in appeal cause number 1771 in said Court of Appeals.

And now comes Emily E. Parish, Executrix, as plaintiff in error to the Supreme Court of the United States, from the decree of the Court of Appeals of the District of Columbia, passed and entered on the 4th day of June 1907, in said appeal cause numbered 1771, in said Court of Appeals, and makes this her assignment of errors, and says that in the record and proceedings in the above entitled matter, there is manifest error in this to wit.

The Court of Appeals erred:

(1) In denying the prayers of the petition.

(2) In holding that the return was sufficient.

(3) In not deciding that the duty imposed on the Secretary of the Treasury was a ministerial duty.

(4) In not deciding that the admissions made by the Secretary of the Treasury, in the return were of themselves sufficient to cause the writ of mandamus to issue.

(5) In not deciding, that in the present case, the unofficial duties imposed by special act upon the Secretary of the Treasury could not be treated, as if the same were the usual and ordinary duties of his office, but being unofficial duties, on which individual rights depended were subject to review, as if imposed on a private individual.

(6) In holding, that the Secretary of the Treasury had discretion given him to decide (forty-two years after the event) that Parish could not have delivered the ice if called upon to do so, notwithstanding the fact that the 9th finding of the Court of Claims explicitly stated "The said Parish was prepared and willing to deliver the said 30000 tons of ice in conformity with the conditions and obligations of his said contract and the terms of said letter of March 25th, 1863, of which the defendants had notice, but they would not nor did not receive more than the 12,768 tons aforesaid."

(7) In holding that the Secretary of the Treasury was not called upon to apply the rule given him to the findings of fact of the Court of Claims, notwithstanding the Committees of the Senate and the House, make the 9th finding of said Court, the basis of the bill they reported, which by the unanimous vote of the two houses, became, when approved by the President, the act of February 17, 1903.

(8) In not deciding that the reports of the Committees which reported the bill were a proper source of reference, in ascertaining the meaning of the act, into which the bill reported by them ripened.

(9) In failing to decide that the act of February 17, 1903 gave a rule for the determination of relief, which the Secretary of the Treasury did not follow.

(10) In not sustaining the demurrer to the return.

(11) In holding that there had been given to the Secretary of the Treasury discretion to determine that the payments theretofore made to Parish by the allowance of the Court of Claims, and the mandate of the Senate and the House, pursuant to the judgment of this Court in 100 U. S. 500 were excessive payments; and, in consequence of such determination, a discretion to deduct whatever he might choose to consider the excess thereof from the balance which would otherwise be payable to claimant. The said Court erred in so holding in the absence of any showing by the Secretary as to the amount of such excess; or any showing as to how he would, or could, or should arrive at it, with a certainty which would authorize him to annul the judgment of this Court, and the legislation of Congress, twenty years after said judgment and enactment had been satisfied; and when no power existed in this country to legally take from Parish, what Congress and the courts had given him by former adjudication and legislation. The said Court erred in so holding, notwithstanding the fact that the Secretary of the Treasury is by the act of February 17th, 1903, directed "to deduct therefrom (*i. e.* from the contract price) all payments, which have been made to said J. W. Parish & Co. or to said J. W. Parish, whether in pursuance of judgments of the Court, or direct appropriation by Congress, or otherwise"; and neither expressly, nor by implication,

invested with the power to find anything less than the whole of said payments to be proper payments, or any part thereof to be excessive, and as such to be charged in diminution of any balance, which would otherwise exist in claimant's favor.

(12) In holding, in effect, that the act of February 17th, 1903, undertook to give to the Secretary of the Treasury, a discretion to revise, correct and defy the judgment of this Court in 100 U. S. 500, and the legislative judgment pursuant thereto; and further to set aside, and for nothing hold the explicit directions of the very act under which said Secretary avowedly was acting.

(13) In not finding that the Secretary of the Treasury had ascertained the balance due to Parish, as required by the act of February 17th, 1903, but had failed to further perform the requirement of said act, by paying over to Parish the balance so ascertained. The act directed the Secretary "to make full and complete examination into the claim of Joseph W. Parish against the United States for balance alleged to be due him," by virtue of a contract made by J. W. Parish & Company with Henry Johnson, a Medical Storekeeper, acting on behalf of the United States; that the Secretary *shall determine and ascertain the full amount* which should have been paid to J. W. Parish & Company if the said contract had been carried out in full, without change or default by either of the parties thereto, under the rules of measure of damages laid down by the Supreme Court in U. S. *v.* Behan 110 U. S. 338; and in accordance with the evidence in the case collected by the U. S. Court of Claims, and after determining the full amount thus due said J. W. Parish and Company under the said contract and rule of law aforesaid, to deduct therefrom all payments which have been made to said J. W. Parish and Company, or to said Joseph W. Parish, whether in pursuance of judgments of the Court or direct appropriation by Congress, or otherwise, stating what balance, if any, is due under the rule and evidence prescribed herein and pay the said balance to said Joseph W. Parish.

This requirement had been fulfilled by the Auditor of the War Department, at the direction of the Secretary, as shown by the following statement of account

5000 tons of ice at St. Louis, Mo.	$16.00 per ton....		$80,000.
" " " " " Cairo, Ill.	$20.00 " "		100,000.
10000 " " " " " Memphis, Tenn.	$20.00 " "		200,000.
10000 " " " " " Nashville	$25.00 " "		250,000.
			$630,000.
From which deduct payment by			
Medical department $129,738.33 (erroneously printed in record).....		$129,783.33	
Settlement by 2d Comptroller's office..		171,072.69	
Award by Court of Claims.....		10,444.91	
Amount saved by non-delivered ice...		137,385.12	
		448,641.05	
Leaving balance due.....			$181,358.95

The Secretary states, that this balance, "is the amount conceded to be due, if anything is due," although there is no suggestion that there is error in this computation to the fraction of a cent, the Secretary ignored the balance so incontestibly due, (and which he was unable to correct), because of a supposed power in himself to disregard prior judgments, and in contravention of them, & of the express language of the act of February 17th, 1903, to decide that Parish could not have transported the ice, if called upon to do so, and therefore was not so much as entitled to the cost to which he had been put, and much less to the contract price he would have received on delivery. Such rejection of the claim, when fully proved, was the same thing as a refusal to act.

HOLMES CONRAD,
LEIGH ROBINSON,
Of Counsel for Emily E. Parish,
Executrix, Plaintiff in Error.

(Indorsed:) No. 1771. The United States *ex rel.* Emily E. Parish, Executrix of Joseph W. Parish, deceased, Appellant, *vs.* George Bruce Cortelyou, Secretary of the United States Treasury. Assignment of errors. Court of Appeals, District of Columbia. Filed Jun 18, 1907. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 64, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The United States *ex rel.* Emily E. Parish, Executrix of Joseph W. Parish, deceased, Appellant, *vs.* George Bruce Cortelyou, Secretary of the United States Treasury No. 1771, April Term, 1907, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 19th day of June A. D. 1907.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 20,768. District of Columbia Court of Appeals. Term No. 111. The United States *ex rel.* Emily E. Parish, executrix of Joseph W. Parish, deceased, plaintiff in error, *vs.* George Bruce Cortelyou, Secretary of the United States Treasury. Filed June 21, 1907. File No. 20,768.

TREASURY DEPARTMENT,
OFFICE OF THE
COMPTROLLER OF THE TREASURY, *January* 21, 1904.

Account of Joseph W. Parish, Claim under Act of February 17, 1903, (32 Statutes 1612) Settled by the Auditor for the War Department, per certificate No. 23729, dated August 11th, 1903.

Upon a revision, on the Comptroller's motion, of the above named account, upon the application filed August 12, 1903, of the Secretary of the Treasury for re-examination, I certify the following differences found by me.

I find, and certify a debit difference of $180,358.95, as per decision of even date herewith, the purpose of this certificate being to eliminate the balance certified by the Auditor, and leave the case open for such action by the Secretary of the Treasury, under the said Act of February 17, 1903, as he may deem proper.

R. J. TRACEWELL,
Comptroller.

I recommend that the paper of which the foregoing is a copy, be, by consent of parties, printed and filed as a supplement to the record of Parish *v.* United States.

Amount is $181,358.95.

Signed by R. J. Tracewell instead of *P.* Tracewell.

[On the back.]

It is stipulated that the within paper may be printed and added to the record of the case of Parish *v.* Secretary of the Treasury, to have the same effect as though certified as part of the transcript already printed and filed.

CHARLES J. BONAPARTE,
Attorney General.

HOLMES CONRAD,
Counsel for Appellant.